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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~266~~ 29

THE CUNARD STEAMSHIP COMPANY, (LIMITED)
PLAINTIFF IN ERROR,

vs.

PATRICK CAREY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 28, 1885.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the second circuit and southern district of New York, Greeting:

Because in the record and proceedings, and also in rendition of a judgment in a plea, which was in the said circuit court before you, between Patrick Cary, plaintiff, and The Cunard Steamship Company (Limited), defendant, manifest error, as it is said, hath intervened, to the great damage of the said defendant, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at

2 Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this eighth day of February, in the year of our Lord one thousand eight hundred and eighty-three and of the Independence of the United States the one hundred and seventh.

JOSEPH M. DEUEL, *Clerk.*

OWEN & GRAY,
Attorneys for Plaintiffs in Error.

The foregoing writ is allowed this eighth day of February, 1883.

WM. J. WALLACE.

3 UNITED STATES OF AMERICA, *Southern District of New York.* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from four to two hundred and twelve, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of The Cunard Steamship Company (Limited), plaintiff in error, against Patrick Carey, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this sixteenth day of August, in the year of our Lord one thousand eight hundred and

eighty-three and of the Independence of the United States the one hundred and eighth.

[Seal of U. S. Circuit Court.]

TIMOTHY GRIFFITH, *Clerk.*

[Endorsed:] U. S. circuit court, southern district of New York. The Cunard Steamship Company (Limited), plaintiff in error, *vs.* Patrick Carey, defendant in error. Writ of error. Owen & Gray, attorneys for pl'ff in error. Due service of the within writ of error is hereby admitted. N. Y., Feb'y 8th, 1883. Herman H. Shook, att'y for def't in error. U. S. circuit court. Feb. 8, 1883. Joseph M. Deuel, clerk.

4 Superior Court of the City of New York.

PATRICK CAREY
ag'st
THE CUNARD STEAMSHIP COMPANY (LIMITED).

CLERK'S OFFICE,
SUPERIOR COURT OF THE CITY OF NEW YORK.

I, Thomas Boese, clerk of the superior court of the city of New York, do hereby certify that annexed hereto is a copy of the record and of the whole of the proceedings in the above-entitled action.

In witness whereof I have hereunto subscribed my name and affixed the seal of the superior court of the city of New York, this 24th day of February, A. D. 1882.

[L. S.] THOMAS BOESE, *Clerk.*

5 *Summons.*

Superior Court of the City of New York.

PATRICK CAREY, Plaintiff,
against
THE CUNARD STEAMSHIP COMPANY (LIMITED), Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated N. Y., December 3, 1881.

HERMAN H. SHOOK,
Pl'ff's Att'y.

Office, No. 261 Broadway, New York.
Post-office address: 261 Broadway, New York.

6 Superior Court of the City of New York.

PARICK CAREY, Plaintiff,

against

THE CUNARD STEAMSHIP COMPANY (LIMITED), Defendant.

The plaintiff, by his attorney, Herman H. Shook, complaining, alleges:

I. On information and belief that the defendant is a foreign corporation, duly chartered under and by the laws of the Kingdom of Great Britain, and was such corporation at the times hereinafter mentioned, and as such corporation owned and still owns and runs a line of steamships between the said Kingdom and the United States of America, and said defendant had at said times and still has an office and place of business in the city of New York and property within this State.

7 II. That the plaintiff is a resident of the city of New York; that on or about the 3rd day of November, 1880, at the time of the committing of the grievances hereinafter mentioned, he was in the employment of the defendant at the city of New York as a longshoreman, in loading and unloading the steamship Batavia, as as plaintiff is informed and believes, on- of the steamships thus owned or chartered and in use by the said defendant, and in the course of said employment, and by direction of defendant, plaintiff was in the hold of said ship hooking coal-tubs to the apparatus variously known as hoisting purchase, or hoisting gear, or hoisting apparatus, the property of the defendant, and owned and in use by said defendant on said steamship at said time, and it was the duty of the defendant to provide a good, safe, and secure hoisting gear, with good, safe, and secure machinery and apparatus.

8 III. That the defendant, not regarding its duty, conducted itself so carelessly, negligently, and unskilfully in this behalf that it provided and used an unsafe, defective, and insecure hoisting apparatus, of which it had notice.

IV. That, for want of due care and attention to its duty in that behalf, on the day and at the place aforesaid, and while the said hoisting apparatus was in the use and service of defendant upon said steamship, and while the plaintiff was in the hold of said steamship, in the capacity aforesaid, for the defendant, the rope connected with and forming a part of said hoisting apparatus, by reason of its unsafeness, defectiveness, and insecurity, broke, whereby the coal-tub attached thereto fell upon the plaintiff, without any fault or carelessness or negligence on his part, fracturing and breaking his left leg.

9 V. That by reason thereof the plaintiff became, and ever since has been, and still remains ill, and is maimed for life; that in consequence of the said fracture the said left leg has become shorter than the right leg, and plaintiff is unable, and for the remainder of his life will be unable, to walk upon said leg, and is compelled to use crutches in moving about; that he has been and still is obliged to expend large sums of money already, about three

hundred dollars, in attempting to cure himself, and since he received said injuries has been and still is prevented from pursuing his business, and is, as he believes, permanently injured, so that he will never be as strong as before, and will never be able to follow his occupation of longshoreman, and he has no other trade or occupation whereby he can earn his livelihood and support his family; and that in consequence of said injuries has suffered, and
10 still suffers, great pain, and was and is otherwise greatly injured, to his damage thirty thousand dollars; that on account of damage the defendant has paid to and on behalf of plaintiff about the sum of nine hundred and fifty dollars, leaving a balance of twenty-nine thousand and fifty dollars.

Wherefore the plaintiff demands judgment against the defendants for the sum of twenty-nine thousand and fifty dollars, besides the costs of this action.

HERMON H. SHOOK,
Plaintiff's Attorney.

Office & post-office address: 261 Broadway, New York.

CITY AND COUNTY OF NEW YORK, *ss:*

Patrick Carey, being duly sworn, says: That he is the plaintiff herein; that the foregoing complaint is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

11 PATRICK CAREY.

Sworn to before me, this 3rd day of December, 1881.
J. ORLANDO HARRISON,
Notary Public, Kings Co., Certificate Filed in N. Y. Co.

(Endorsed:) Superior court of the city of New York. Patrick Carey, pl'ff, ag'st The Cunard Steamship Company (Limited), def't. Copy summons & complaint. H. H. Shook, pl'ff's att'y. Office & P. O. address, 261 Broadway, N. Y.

12 Superior Court of the City of New York.

PATRICK CAREY
vs.
THE CUNARD STEAMSHIP COMPANY (LIMITED).

The defendant above named, by Owen & Gray, its attorneys, answers the complaint of the plaintiff herein as follows:

I. It admits the employment of the plantiff and that it owned the steamship "Batavia."

It denies that it has any knowledge or information sufficient to form a belief as to each and every remaining allegation of the second article of the complaint.

II. It denies each and every allegation contained in the third and fourth article- of the complaint.

III. It admits that it has paid to the plaintiff the sum of nine hundred and fifty dollars, or thereabouts.

13 It denies that it has any knowledge or information sufficient to form a belief as to each and every remaining allegation contained in the fifth article of the complaint.

Wherefore the defendant demands judgment that the complaint be dismissed with costs.

OWEN & GRAY,
Defendant's Attorneys.

CITY AND COUNTY OF NEW YORK, *ss:*

Vernon H. Brown, being duly sworn, deposes and says: That he is a member of the firm of Vernon H. Brown & Co., managing agents in the city of New York of the defendant in the foregoing answer named; that he has read the said answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

14 VERNON H. BROWN.

Sworn to before me, this 3rd day of January, 1882.

THOMAS F. MURTHA,
Notary Public, New York Co. (60).

(Endorsed:) Superior court. Patrick Carey *vs.* The Cunard Steamship Company (Limited). Answer. Owen & Gray, def't's att'y-, 71 Wall St. Due service of a copy of the within answer is hereby admitted. N. Y., Jan. 4, 1882. Herman H. Shook, pl'ff's att'y. Filed Feb. 23, 1882.

15 Superior Court of the City of New York.

PATRICK CAREY
vs.
THE CUNARD STEAMSHIP COMPANY (LIMITED).

Upon the summons and pleadings in this action, the petition and bond hereto annexed, and the affidavit of Frank D. Sturges herewith let the plaintiff and his attorney show cause before me, or one of the justices of this court, at a special term thereof, to be held at chambers, in the court-house, in the city of New York on the 23rd day of February, 1882, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why the prayer of said petition should not be granted, the bond offered therewith accepted, and this cause removed to the next circuit court of the United States to be held in and for the southern district of New York,

16 in the second circuit, for trial; and until the hearing and determination of the motion upon the return of this order to show cause, let all proceedings in this action be stayed.

Let service of the moving papers, on or before February 20th, 1882, be a sufficient service thereof.

February 18th, 1882.

WM. H. ARNOX, *Judge.*

17 Superior Court of the City of New York.

PATRICK CAREY
vs.
THE CUNARD STEAMSHIP COMPANY (LIMITED).

To the superior court of the city of New York:

Your petitioner, The Cunard Steamship Company (Limited), respectfully shows to this honorable court that an action has been commenced in this court by Patrick Carey, the above-named plaintiff, to recover against your petitioner damages for injuries alleged to have been received through the negligence of your petitioner in furnishing unsafe and insufficient materials and machinery to the plaintiff, an employee.

That the matter in dispute in said action exceeds the sum of five hundred dollars, exclusive of costs.

That the controversy in said action is between citizens of different States.

18 That at the time of the commencement of the said action, the plaintiff, Patrick Carey, was and now is, as your petitioner is informed and believes, a citizen of the State of New York; and that at said time your petitioner, The Cunard Steamship Company (Limited), was and now is a foreign corporation, created and existing under and by virtue of the laws of Great Britain, and was and is a citizen of Great Britain.

That issue was joined in this action by the service of the answer, on or about January 4, 1882; that the term of this court at which this action could be first tried is this present term of February, 1882, the same having commenced February 6th, and that this action has not been tried nor has the trial thereof commenced.

That your petitioner offers a bond, *with good and sufficient bond*, with good and sufficient surety, for its entering, in the circuit court of the United States for the southern district of New York, in

19 the second circuit, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto, and for appearing and entering special bail, if special bail was requisite therein.

Wherefore your petitioner prays that this action be removed for trial into the next circuit court of the United States in and for the southern district of New York, in the second circuit; that this court will accept the bond and surety herewith offered, and cause the record herein to be removed and proceed no further in this action.

And your petitioners will ever pray, &c.

CUNARD STEAMSHIP CO. (LIMITED),
Per VERNON H. BROWN & CO., *Agents.*
VERNON H. BROWN.

OWEN & GRAY,
Attorneys for Petitioners.

20 STATE OF NEW YORK, }
City & County of New York, } *ss:*

Vernon H. Brown, being duly sworn, deposes and says: That he is a member of the firm of Vernon H. Brown & Company, general and managing agents for the Cunard Steamship Company (Limited), the petitioner in the foregoing petition named; that he has read the said petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

VERNON H. BROWN.

Sworn to before me, February 18, 1882.

S. G. LEATHEIN,
Notary Public, New York Co.

21 Know all men by these presents that we, The Cunard Steamship Company (Limited) and *and* John C. Curtis, of *of* 245 Monroe street, Brooklyn, N. Y., are held and firmly bound unto Patrick Carey in the sum of one thousand dollars, lawful money of the United States of America; for which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, dated the 18th day of February, one thousand eight hundred and eighty-two.

Whereas an action has been commenced in the superior court of the city of New York by the said Patrick Carey, a citizen of the State of New York, against the said Cunard Steamship Company (Limited), a foreign corporation, incorporated under the laws of Great Britain, and a citizen of Great Britain, and the matter in dispute in said action exceeds the sum of five hundred dollars, exclusive of costs;

22 And whereas the said defendant, The Cunard Steamship Company (Limited), is about to present its petition pursuant to the act of Congress in such case made and provided, for the removal of the said cause for trial into the next circuit court of the United States, to be held in and for the southern district of New York, in the second district:

Now, therefore, the consideration of the above obligation is such that *that* if the said The Cunard Steamship Company (Limited) enters in the said circuit court of the United States, to be held in and for the southern district of New York, in the second circuit, on the first day of its next session, a copy of the record in this suit, and shall pay all costs that may be awarded by the said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall then and there appear and enter special bail, if special bail was originally requisite therein, then this

23 obligation shall be void; otherwise the same shall be and remain in full force and effect.

CUNARD S. S. CO. (LIMITED), [L. S.]
Per VERNON H. BROWN & CO., *Agents.* [L. L.]
J. C. CURTIS. [L. S.]

Sealed and delivered in presence of—
S. G. LEATHEIN.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

——— ———, one of the sureties in the above bond named, being duly sworn, deposes and says that he is a resident and — holder within the State of New York, and is worth the sum of two thousand dollars over and above all his debts and liabilities which he owes or has incurred, and exclusive of property exemp- by law from levy and sale under an execution.

Sworn to before me this — day of February, 1882.

STATE OF NEW YORK, *City & County of New York:*

John C. Curtis, one of the sureties in the above bond named,
24 being duly sworn, deposes and says: That he is a resident and freeholder within the State of New York, and is worth the sum of two thousand dollars over and above all his debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

J. C. CURTIS.

Sworn to before me this 18th day of February, 1882.
S. G. LEATHEIN,
Notary Public, New York Co.

STATE OF NEW YORK, }
City & County of New York, } *ss:*

On this 18th day of February, 1882, before me personally appeared John C. Cartis, and to me known, and known to me to be one of the individuals described in and who executed the foregoing instrument, and they severally acknowledged that they executed the same for the uses and purposes therein mentioned.

25 And on the day and year aforesaid Vernon H. Brown, to me personally known, and known to me to be a member of the firm of Vernon H. Brown & Co., who, being by me duly sworn, says: That he is a member of the firm of Vernon H. Brown & Co., the duly authorized agent- in the city of New York of the Cunard Steamship Company (Limited), one of the parties described in, and who, by his said firm, executed the foregoing instrument and acknowledged to me that he executed the same on behalf of his said firm by authority from the said Cunard Steamship Company (Lim-

ited), and that he affixed the seal to said instrument by like authority.

S. G. LEATHEIN,
Notary Public, New York Co.

The foregoing bond is hereby accepted and approved.

WM. H. ARNOX, *Judge.*

26 Superior Court of the City of New York.

PATRICK CAREY
vs.
THE CUNARD STEAMSHIP COMPANY (LIMITED).

CITY & COUNTY OF NEW YORK, *ss:*

Frank D. Sturges, being duly sworn, deposes and says: That he is one of the attorneys for the defendant, in the above-entitled action. That no previous application has been made for the foregoing order to show cause, which is asked in order that the application may be disposed of at an early day, and if denied that the trial of the action may not be delayed, the cause being on the day calendar of this court for February 20, 1882.

FRANK D. STURGES.

Sworn to before me, February 18, 1882.

S. G. LEATHEIN,
Notary Public, New York Co.

27 CITY AND COUNTY OF NEW YORK, *ss:*

Thomas F. Murtha, being duly sworn, says: That he is a clerk in the office of Owen & Gray, Esq's, the attorneys for the defendant in the foregoing action named. That on the 20th day of February, 1882, deponent served the within petition, bond, affidavit, and order to show cause on H. H. Shook, Esq., the plaintiff's attorney, by leaving copy's thereof with him at his office, No. 261 Broadway, in the city of New York, and at the same time exhibiting to him the original bond, petition, affidavit, and order.

THOMAS F. MURTHA.

Sworn to before me, February 20, 1882.

ANDREW WOELFEL,
Notary Public, Kings Co., Cert. filed in N. Y. Co.

(Endorsed:) N. Y. superior court. Patrick Carey *vs.* The Cunard Steamship Company (Limited). Petition, bond, affidavit, and order to show cause for removal of cause to U. S. circuit court. Filed Feb. 23, 1882. Owen & Gray, def't's att'y-, 71 Wall street, N. Y. city. U. S. circuit court. Filed Mar. 1, 1882. Joseph M. Deuel, clerk. $3.25. Paid R. Grennan, dist. tel. boy.

27½ U. S. Circuit Court, Southern District of New York.

PATRICK CAREY
vs.
THE CUNARD STEAMSHIP COMPANY (LIMITED).

This action having been originally brought in the superior court of the city of New York, and the defendant having filed in said court his petition and bond for the removal thereof to this court, and the same having been removed to this court on the application of the defendant, and the defendant having filed and entered in this court a certified copy of the record in said action in the superior court of the city of New York, and the defendant having appeared herein by Owen & Gray, its attorneys:

Now, on motion of Owen & Gray, defendant's attorneys, it is ordered that this action do proceed in this court in the same manner as if it had been brought herein by original process, and that the appearance of the said defendant, by Owen & Gray, its attorneys, be, and the same is hereby, noted and entered.

28 United States Circuit Court, Southern District of New York.

PATRICK CAREY, Plaintiff,
vs.
THE CUNARD STEAMSHIP COMPANY (LIMITED), Defendant.

To the clerk of above-named court:

Please take notice that I hereby enter my appearance herein for the plaintiff above named as his attorney, the above case having been removed here from the superior court of the city of New York.

Dated March 11, 1882.

HERMAN H. SHOOK,
Pl'ff'- Att'y, 261 *Broadway, New York.*

(Endorsed:) U. S. circuit court, southern district of N. Y. Patrick Carey, pl'ff, *vs.* The Cunard Steamship Company (Limited), def't. Pl'ff'- appearance. H. H. Shook, pl'ff's att'y, 261 B'way, N. Y. C. U. S. circuit court. Filed Mar. 11, 1882. Joseph M. Deuel, clerk.

29 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Thursday, the 2nd day of November, in the year of our Lord one thousand eight hundred and eighty-two.

Present: The honorable Nathaniel Shipman, judge.

PATRICK CAREY
vs.
THE CUNARD STEAMSHIP COMPANY (LIMITED).

This cause being still on trial, the jurors sworn in it are called and severally answer to their names.

Mr. Sturges sums up the case on the part of the defendant.

Mr. Shook sums up the case on the part of the plaintiff.

Charge is thereupon given by the court to the jury, who retires in charge of an officer duly qualified to attend them, and on their return say that they find a verdict for the plaintiff for the sum of fifteen thousand dollars, and so say they all.

Mr. Sturges moves for a new trial, and also that the verdict be set aside.

On motion of Mr. Sturges, ordered that the defendant have a stay of proceedings herein for thirty days within which to prepare and serve a bill of exceptions herein. H. H. M.

30 U. S. Circuit Court.

PATRICK CAREY
vs.
THE CUNARD STEAMSHIP COMPANY (LIMITED).

Upon the annexed affidavit of Frank D. Sturges, duly verified, let all proceedings on the part of the plaintiff be stayed until Monday, December 11th, 1882.

N. Y., Dec. 2d, 1882.

ADDISON BROWN.

31 U. S. Circuit Court.

PATRICK CAREY
vs.
THE CUNARD STEAMSHIP COMPANY (LIMITED).

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Frank D. Sturges, being duly sworn, says: He is one of the attorneys for the above-named defendant.

The action was brought for damages for injuries sustained by the plaintiff while in the defendant's employ, and after a trial, occupying five days, the action resulted in a verdict for the plaintiff for $15,000, which was rendered November 2nd, 1882.

Deponent applied to Judge Shipman, before whom the trial was had, for time to prepare a bill of exceptions, and was granted thirty [days], with a stay of proceedings in the mean time.

32 Deponent also applied to make a motion for a new trial upon the exceptions and upon the evidence, which motion the learned judge said might be made when the bill of exceptions *were* prepared.

Deponent has been unable to prepare said bill of exceptions fully, the testimony being voluminous and the time to serve the same expires to-day; Judge Shipman is not in this city and deponent has not been able to learn when he will be here so as to hear the motion; that plaintiff's counsel desires to enter judgment herein, but deponent does not consider it advisable that the same should be entered until said motion is determined, which motion deponent intends in good faith to make at the earliest opportunity; that if the same should be denied deponent intends in good faith to take the proper proceedings to review said judgment in the Supreme Court. Deponent,

therefore, asks that an order be made staying all proceedings herein until fifteen days from date, so as to enable deponent to com-
33 municate with Judge Shipman with regard to the motion, as in deponent's opinion such stay cannot injure any rights of the plaintiff.

FRANK D. STURGES.

Sworn to before me, Dec. 2, 1882.
[L. S.] ANDREW WOELFEL,
Notary Public, Kings Co., Cert. Filed in N. Y. Co.

(Endorsed:) U. S. circuit court. Patrick Carey *vs.* The Cunard Steamship Company (Limited). Order staying proceedings. Owen & Gray, def't's att'y-, 71 Wall street, N. Y. city. U. S. circuit court. Filed Dec. 4, 1882. Joseph M. Deuel, clerk.

34 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the 26th day of January, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The honorable Nathaniel Shipman, judge.

PATRICK CAREY
ag'st
THE CUNARD STEAMSHIP COMPANY (LIMITED).

A motion herein having been made by the defendant for a new trial upon the bill of exceptions duly settled, and after hearing Frank D. Sturges, Esq., of counsel for defendant, in favor of said motion, and Hermon H. Shook, of counsel for plaintiff, in opposition thereto, and after due deliberation thereon: Now, on motion of Hermon H. Shook, of counsel for plaintiff, it is ordered that the said motion for a new trial on the said bill of exceptions be, and the same hereby is, denied.

And it is further ordered that the stay of proceedings
35 pending said motion be, and the same hereby is, vacated and set aside.

N. SHIPMAN, *Judge.*

(Endorsed:) U. S. circuit court, southern district of New York. Patrick Carey *vs.* The Cunard Steamship Company (Limited). Order denying motion for a new trial. Hermon H. Shook, plaintiff's attorney, 261 Broadway, N. Y. U. S. circuit court. Filed Jan. 26, 1883. Joseph M. Deuel, clerk.

36 Circuit Court of the United States for the Southern District of New York.

PATRICK CAREY
ag'st
THE CUNARD STEAMSHIP COMPANY (LIMITED).

This cause having duly come on for trial before the Hon. Nathan-

iel Shipman, judge, and a jury, at the United States court-rooms, in the city of New York, on the 30th day of October, 1882, and duly continued until the determination thereof, and the issues having been duly tried, and the jury having rendered a verdict on the 2d day of November, 1882, in favor of the plaintiff, Patrick Carey, and against the defendant, The Cunard Steamship Company (Limited), for the sum of fifteen thousand dollars, and the costs and disbursements having been adjusted at sixty-seven dollars and sixty-six cents:

Now, on motion of Hermon H. Shook, attorney for the
37 plaintiff, it is ordered and adjudged that the plaintiff, Patrick Carey, recover of the defendant, The Cunard Steamship Company (Limited), the sum of fifteen thousand dollars, the amount of the verdict, with interest thereon, amounting to two hundred seventeen & $\frac{50}{100}$ dollars, and costs, as taxed, amounting to sixty-seven & $\frac{66}{100}$ dollars, and amounting, in the aggregate, to the sum of fifteen thousand two hundred eighty-five $\frac{16}{100}$ dollars, and that plaintiff have execution therefore.

Judgment signed this 29th day of January, 1883.

J. M. DEUEL, *Clerk.*

Endorsed: U. S. circuit court for the southern district of New York. Patrick Carey *vs.* The Cunard Steamship Company (Limited). Judgment roll. Hermon H. Shook, plaintiff's attorney, 261 Broadway, N. Y. Damages, —; costs, —; total, —. U. S. circuit court. Filed Jan'y 29, 1883. Joseph M. Deuel, clerk. 3.45 o'clock.

38 U. S. Circuit Court, Southern District of New York.

PATRICK CAREY
against
THE CUNARD STEAMSHIP COMPANY (LIMITED).

Afterwards, to wit, at a circuit court of the United States, held at the court-rooms in the United States post-office building in the city of New York, in and for the southern district of New York, before Nathaniel Shipman, Esq., judge of the United States circuit court for the district, appointed to hold the said circuit court, on the 30th day of October, 1882, the aforesaid issues so joined between the parties as aforesaid came on to be tried by a jury for that purpose duly empaneled, at which day came there as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid, for that purpose duly empaneled to try the said issues, being called, also came, and were then and there in due manner chosen and sworn to try the said issues.

And upon the trial of the said issues the counsel for the plaintiff, to maintain and prove the issues on his part, called PATRICK CAREY, the plaintiff, who testified as follows:

I am thirty-three years of age; am married, and have a
39 family of two girls; one will be seven next March; the other will be ten next Christmas. I am [a] longshoreman. It is two years since I worked at it. On November 3d, 1880,

I was in the employ of the Cunard Steamship Company. I had been in their employ going on two years. On that day I was ordered by Boss Craven to go down in the lower hold of the steamship Batavia and shovel coal. Craven was the foreman of the dock. Mr. Storey was superintendent of the dock. I went down in the lower hold of the Batavia; I went to work at coal. My branch of the work was hooking on the tubs in the lower hold; putting on the hook on the tubs as soon as they were full, and unhooking the empty tubs. I put the tubs on the hooks of the full and unhooked the empty tubs that descended. There must have been at that time something about four or five hours' work. I could not exactly say how much coal there was in it; there might be a hundred tons for all I know. There was with me Pat. O'Brien, Tim. Lane, John Foley, Charlie Flinn, and Thomas Henretty; I guess that is all. This hold I suppose was something about eighteen or twenty feet deep, and would hold about two or three hundred tons of coal. This coal had to be hoisted from the lower hold up to the steerage deck, which
40 was the deck immediately above the hold. The height from the bottom of the hold up to the steerage deck must have been something about twenty-eight or thirty feet. I did not rig that fall that night. There were six tubs down there. The weight of an empty tub was about one hundred and seventy-five pounds, from that to two hundred. The weight of the tub full I suppose was about two hundred and a half, from that to three hundred, as far as I can judge. The hold there was lighted with lamps.

Q. Where did your duty require you to be; in what part of the hold?

A. Right by the edge of the hatch; about four feet of the rope came under my eye. I worked along there until about half past ten or quarter to eleven. Something about six or eight tubs of coal were left then, I guess. At that time I was in the lower hold hooking on tubs and unhooking empty tubs, and so after hooking on a full tub and sending it up, and going to take in the empty tub that was coming down, all of a sudden the hatch got suddenly dark; I thought some of the lamps had gone out, and all of a sudden the tubfull of coal came down on top of me where I stood and broke my leg, and I fell down in the hold, and three men put me in the skid in the lower hold and hoisted me to the top deck. After I got on the top deck the ship's doctor examined my leg and found it was bleeding very bad, and put some sort of liniment or
41 something to keep the cold from getting in it until I could get to the hospital, and he bandaged the leg, and they put me on a door, I think, or something like that, and put a mattrass and a pillow under me and blanket over me, and those men took me to St. Vincent's Hospital. Something about half past eleven we got up there; the doctors dressed my leg as well as they could, and the next morning done the same thing again, and held a consultation that night again for my leg to be cut off, so I wouldn't have the leg cut off; they said I would die.

DEFENDANT'S COUNSEL: I object to that as immaterial. I think he should state the facts, not the conversation with the physician.

Objection overruled. Defendant's counsel excepts.

They told me my leg would have to come off or else I would die, and I told them if I would die I would die with my two legs on, so there wasn't any more about it; so they got two straps on each side of my leg that way, and the straps came as far as this (indicating a little above the middle of the thigh), and then they put a piece of wood, that stuck out about that length (indicating about fifteen inches), from my foot with a kind of pulley to it and a weight, and they kept me that way, I guess, about three or four months; they took that off then and put plaster Paris on me, and they keep it in the plaster Paris for ten or twelve days; and then they took the plaster Paris off again, and they put it into a box with bran in it and a
42 pillow, and they kept it that way then for about four or five months, and then I got kind of homesick and didn't want to stay in the hospital any longer; so [I] asked Dr. Owen, the house surgeon, if I couldn't go home; he says, "Yes; if you want to go home, I suppose you can't be kept;" so next morning I sent word down to my wife to get a carriage and take me home. When I got home I got Dr. Burke to attend me, and he has been attending me from that time to this; and he put me in the same extension and put a weight to it about seventeen pounds, and kept me about three months.

Q. Look at those and state what they are.

A. Bones that came out of my leg.

(The package of bones is put in evidence and the wrapper marked "Plaintiff's Ex. No. 1.")

When I reached the upper deck, when they took me up in the skid, there was on the upper deck Christy Gerraghty and the chief officer of the ship; Christy Gerraghty was the coal boss.

Q. Did he have charge of that gang of men there?

A. Yes, sir.

Q. Who else?

A. And the chief officer of the ship and the doctor; and there was some men, but I didn't pass much remarks over what was there, according to the trouble of me at the time.

Q. Or Mr. Craven, the foreman?

A. No, sir; the effect upon me of this treatment in the hospital was I went through pain and suffering; I had pain all the time while I was in it.

43 I used to have them come there every night for the pain, when they used to put morphine right here in my arm, and so I could get to sleep; and when that wouldn't do they would bring me morphine in the glass to put me to sleep. And part of the time that wouldn't do, and I had no rest, and part of the time I could not sleep nor eat. Dr. Phelps was the first physician in charge of me; Dr. Smith succeeded him. Dr. Phelps was there about a month; then Dr. Smith took charge of me; he continued in charge two months. Dr. Little succeeded him, and when I reached home Dr. Burke took charge of me. Before I was able to go out after I

reached home, was somewhere about three or four months. That would be about June or July. Then I had to go out on crutches. I have used crutches ever since. I couldn't say exactly what is the length of the broken leg, but it is four inches and a half short. I have never been able to work at anything since this accident. I have not been able to support my family. I have not received any money, not from anybody, except what wages I got from the company. The company paid my wages something about ten or eleven months after this injury; they were paying me prior to the injury about twelve dollars a week for about twelve months, and then they gave me fourteen.

Cross-examined:

44 This hatchway where these tubs were going up and down was somewhere about four feet and a half each way, and when one tub was going up and the other coming down it would be pretty near filled up.

Q. On which side of the ship was this tub filled that you sent up?

A. The inshore side that night where we were working; the ship was headed into the street.

Q. And the men were not working on the outshore side at all?

A. No, sir.

Q. Then all the coal was in the wing on the inshore side of the ship?

A. Yes, sir.

Q. Next to the dock?

A. Yes, sir.

Q. And did this tub go up on the inshore side of the hatch?

A. Yes, sir.

Q. And when it went up would you stand near the edge of the hatch under the deck?

A. I was just after sending it up.

Q. No; but when you hooked it on where did you stand?

A. I followed the tub out to the hatch.

Q. And then you stood under the edge of the hatch on the inshore side?

A. I went to pull in an empty tub, so I did.

Q. I am speaking now of sending up a full tub.

A. I crossed the hatch to pull in the empty tub that was there.

Q. I want to know where you stood at the time that you sent up the full tub.

A. I didn't stay there at all. I went to pull in the empty tub.

Q. Didn't you guide that full tub to the edge of the hatch?

A. Yes, sir.

Q. On which edge of the hatch did you stand to guide it so?

A. I stood on the inshore side where we were working.

45 Q. And then this tub went up on that side?

A. Yes, sir.

Q. And then, as I understand, the tub was coming down on the outshore side?

A. Yes, sir.

Q. And you simply stepped up and grasped it with your hand?
A. I was told to do so.
Q. I ask you whether you did or not?
A. Yes, sir.
Q. And you guided this descending tub with your hand on the edge of it?
A. Yes, sir.
Q. That is the way you generally did catch them?
A. Yes.
Q. And were you going to pull that tub down to the inshore side of the ship where the men were working?
A. Yes, sir.
Q. Who hired you?
A. Mr. Storey, the superintendent of the dock, hired me about a week after the ships moved from Jersey City there. It must have been about a year or ten months before this accident.
Q. So that you had been at work there for quite a little while?
A. Yes, sir.
Q. Had you ever been engaged in doing this same kind of work before?
A. Yes, sir; often.
Q. You say you don't know how much coal there was left in the hold at the time you were hurt?
A. I say there was about six or eight tubs.
Q. How many lamps were there in the hold?
A. I couldn't say.
Q. How wide was the hold of the ship under this hatch?
A. About four feet and a half each way.
Q. No, no; right across the ship; the place where this hatch was?
A. I couldn't say.
Q. Have you no idea?
A. No, sir.
46 Q. Did you state who was down there at the time you were hurt?
A. To the best of my recollection the men that were down there I told you.
Q. Was Christy Gerraghty down there?
A. Not at the time that happened.
Q. Are you sure of that?
A. He may be up in the between decks; he wasn't down in the hold.
Q. Wasn't he down in the hold at the time you were hurt?
A. Not that I saw.
Q. But you can't be positive as to whether he was or not?
A. No, sir.
Q. And when you went up on the deck, with regard to Mr. Storey and Mr. Craven, all you know is that you didn't see them there?
A. They wasn't there on deck.
Q. No, no; you mean to say you didn't see them there?
A. Yes, sir.

Q. Had you been at work there during the afternoon?
A. No, sir.
Q. Not at all?
A. No, sir.
Q. How many tubs did you hook and unhook that night?
A. I couldn't tell you.
Q. Was there another man there doing the same work?
A. He was on the opposite side.
Q. On the opposite side of the hatch?
A. Yes, sir.
Q. Who was he?
A. Thomas Henretty.
Q. There were only two tubs in motion at a time?
A. Yes, sir.
Q. One going up and the other coming down?
A. Yes, sir.

Q. How many decks were there between the top of the hold
47 and the steerage deck?

A. There was no deck between where the coal was hoisted.
Q. And the steerage deck?
A. No; only kind of beams laid there.
Q. And you think the distance from the bottom of the hold up to the steerage deck was about thirty feet?
A. From the top deck?
Q. From the steerage deck to the hold?
A. About eighteen or twenty feet.
Q. Who paid you your wages?
A. Mr. Smith, the time-keeper.
Q. And do you know whether he had any other position on the dock?
A. No, sir.
Q. Do you know what his name is?
A. Robert, I guess.

Redirect:

I noticed the rope after I was knocked down by the tub. The tub rolled off of me; I noticed the end of the rope; it looked some like a wisp-broom or something that would be worn out.

Q. You were asked whether you saw Mr. Gerraghty down in the hold at the time of this accident?
A. Yes, sir.
Q. And you testified that you did not?
A. No, sir; I didn't see him.
Q. You heard no orders from him at that time?
A. No, sir.
Q. And received no communication from him that time?
A. No, sir.
Q. Just stand up and let the jury look at your leg, so that they can see how it hangs, and what its length is.

(The witness shows himself to the jury.)

48 Recross:

Q. You say you noticed this end of the rope?
A. Yes, sir.
Q. When was it that you noticed the end of the rope?
A. After I got my leg broken.
Q. How long after?
A. It may be about a couple of minutes.
Q. You had to turn your head to see it?
A. Yes, sir.
Q. Did anything call your attention particularly to the end of the rope; did any person speak of it?
A. No more than it was broke.
Q. Did the shoveling of the coal in the hold raise any dust?
A. Yes, sir.
Q. Did you notice whether any of this coal fell out of the tub which struck you?
A. No, sir; not until the tub fell down.
Q. Then, when it fell down the coal fell out of it?
A. Yes, sir.
Q. What kind of coal was it?
A. Liverpool fine coal.
Q. How fine?
A. Well, as fine as dirt, only once in a while you would get some small little lumps.
Q. Any lumps in it?
A. Not any lumps of any bigness.
Q. How large lumps did you meet in it?
A. O, sometimes as large as my head, maybe bigger.
Q. You say the end of the rope looked like a wisp-broom; did you see the color?
A. No, sir.
Q. Did you notice the end of the rope particularly?
A. Yes, sir.
Q. How many strands were there?
A. I couldn't say; I am not a sailor man.
Q. You didn't notice how many strands there were to the rope?
49 A. No, sir.
Q. Were these strands apart from each other?
A. Yes, sir.
Q. For how long a distance were they separated from the end?
A. I can't exactly say.
Q. I don't want to know exactly; about how far?
A. About a foot, I should say.
Q. Do you remember about that?
A. Yes, sir.
Q. Do you remember that the strands of this rope were separated from the end?
A. As far as I could judge, a foot.

The plaintiff, further to maintain the said issues on his part, called JOHN A. BURKE, who testified as follows:

My occupation is that of a physician and surgeon; I have been such since 1878; I was at the St. Vincent Hospital when Mr. Carey was brought in as a patient, whenever that was; I remember him brought there; I saw his condition; he had a compound comminuted fracture of the thigh-bone; that is, the thigh-bone was broken in a number of pieces, and the ends of the bones were projecting out through the flesh—out through the skin; and the flesh all around the upper part of the thigh was bruised and lacerated, and you could put your hand from one side in through the other, and small fragments of bone were taken out; you could see the bones; he was bleeding a great deal and in a very weak condition when he was brought in; I was present at the consultation between physicians over his case on the following night; the result of that consultation was that they came to the conclusion that it was
50 better to amputate the leg, for they thought his life would be less endangered to amputate the leg than to allow it to remain on and try to heal it in that way; that decision on the part of the physicians was communicated to Carey; I saw him in the hospital after that from time to time; I saw him there every two or three days, and I saw the treatment from the time he went in until he left, and I noticed the changes from one time to another; I noticed that he was growing very weak, and sometimes we thought he would die; the condition was that he was so very ill; at some times we thought he would die—that he wouldn't rally from it; the amount of suppuration and the pain that he endured was so great that he became very much emaciated; and then he could take no nourishment and no sleep for a long time; for perhaps six weeks or two months we thought he would die, but he rallied from it and gradually got better until he left the hospital.

I saw this extension which he has spoken of himself; there were two plaster straps, two adhesive straps of plaster, one placed on each side of the leg and projecting about four or six inches from the foot, and at the end of that was attached a weight of ten or twelve pounds—I don't know exactly how many pounds—to extend the limb, the tendency of the muscles being to contract and make the leg shorter, and make the bones lap over each other and stick in the flesh, and the extension was put on to prevent the pain and give him a chance, if he got well, of having a useful leg; of course it was to prevent as much suffering as possible.

51 Q. What was the effect upon him, so far as pain and suffering are concerned, of this extension?

A. It relieved it for a time, but the amount of suffering was so great that Carey was unable to bear it, and the extension was removed and plaster Paris put on; then, after awhile, the extension was put on again, when he became stronger and was able to bear it. The degree of pain and suffering which Carey underwent there in the hospital must have been very great; I couldn't say the amount of it; it must have been very severe; he must have suffered a great

deal of pain; he was unable to sleep some of the time and unable to take nourishment of any kind, and had to lie in one position from the time he went in until he came out, and was unable to turn in bed; the character of the pain must have been very severe; I never knew a worse case than his to recover. He left the hospital March 25th, I think; that was my first visit to his own house; then I took charge of the case. What I have testified heretofore was my observation in the hospital. When I first saw him at his house he was, of course, emaciated, run down, and suffering considerable pain, and had a large raw surface on both sides of his leg not healed over; you could put a probe from one side to the other—put your finger through the holes from one side to the other and feel the bones in there with your finger; there were several pieces of bone loose in there—broken up—but they could not be removed at that time; they were removed some time after that, and the length of the limb was
52 four and one-half inches short as the result; I saw these bones afterwards; I took them out; I had to make a number of incisions; these bits of bone would become detached where they were broken off, become loose, and irritate the tissues inside, and set up abscesses, and I had to make incisions there and put in instruments—forceps, probes, and so on—and draw them out. I last examined Carey—I guess it must be a month or six weeks ago; these holes were not in his leg at that time; they had healed up then; there were deep depressions there.

Q. Just examine Carey's leg now and see if those depressions are there.

A. (Examining the limb through the clothing.) Yes, sir; they are still there; I think I have stated now all the results of my treatment and my observation of his case; he has a stiff joint; he has a stiff ankle joint and also stiff knee joint, and the leg is four and one-half inches short; there is no chance whatever of the leg being able to be bent; these bones that I removed are a part of what makes it so short, and the injury is so near the knee joint that the ends of the bones are partly united there in the joint, and his leg must remain in that condition through life; he would not be able to follow his avocation as longshoreman with that leg.

Q. Is there any pursuit that he will be able to follow?

A. None by which he would be compelled to stand on his feet, unless he could use crutches.

Q. How about further pain; will he experience any pain from the leg?

A. Probably will; change of weather and any other sick-
53 ness that he may have will probably affect him at that part. I have been a medical examiner of an insurance company; as an examiner, I examined the cases and stated their condition and gave my opinion as to the probable length of life, &c.

Q. What is your opinion now as to the probable length of Carey's life in his present condition?

A. I should give him about twenty years aside from his injury at the leg. His general health is good. Physically he is in very good condition aside from his leg.

Q. What is his condition now as compared with his condition when he was brought into the hospital? I suppose, then, you could form some opinion as to what his condition was before his injury?

A. He was a strong, healthy man; apparently more so than he is now.

Cross-examined:

Q. Do you know, according to what are called the Northampton mortality tables, what the probable length of life of a man thirty-three years old is?

A. No, sir.

[Q.] Do you know the circumstances under which Carey left the hospital?

A. Yes, sir.

[Q.] Do you know whether or not it was against the wish and desire of those who had charge of him there?

A. They didn't wish to have him go; it was against their wish.

Q. Do you know whether it was against the wish of the physicians that were attending him?

A. Yes, sir; they wanted to see the case through, and they would rather have him stay there than go away and have it pass out of their hands.

54 Q. Who had charge of the case there?

A. Dr. Phelps, Dr. Smith, and Dr. Little.

Q. Was Dr. Luby there?

A. Yes, sir; Dr. Luby was an assistant. He acted under the orders of the other three.

Redirect:

Q. You say it was against the wish. Was it dangerous for him to be removed to his house?

A. Not for that reason; only they wished to see the case through.

Q. They wanted to see the case through?

A. They wanted to see the case through; they had no other objection.

Q. Was it, in your opinion, dangerous for him to be removed from the hospital to his home?

A. No, sir; not at all.

Q. In no way whatever?

A. No, sir.

The plaintiff, further to maintain the issues on his part, called STEPHEN SMITH, who testified as follows:

I am a physician and have been in practice thirty years. My office is in this city; I recollect the case of Patrick Carey at the St. Vincent's Hospital in 1880. He came under my charge about the first of December. My rank in the hospital was surgeon, directing surgeon for the time that I was there; I was there two months. During that time I had charge of a certain number of cases, and directed their treatment; I recollect this case. When I came on duty I found him there under treatment; at that time it was what we

call a compound fracture of the thigh in the lower part of the left thigh, and at that time was undergoing a great amount of suppuration; that is, a great amount of matter discharging from the wound; and he was suffering very great pain, apparently, from the injury to the principal nerve in the leg, I suppose the popliteal nerve, from the amount of pain he had and the degree of it; so much so that it was almost impossible to handle his leg, to adjust it or put it in any position, without almost throwing him into convulsions, the pain would be so very great; and when I came on duty it was out of position very much, owing to the difficulty of keeping it in position, and at the same time keeping it clean—free from this great amount of discharge that was taking place into the bed; he had to be changed several times during the day in order to keep the bed clean—keep him clean; and it was always attended with an immense amount of pain. There was a great deal of shortening of the leg at that time, and the foot was turned inward, and it was impossible to turn it out without this excessive pain. And after having him under treatment for a short time, we gave him ether and tried to suspend his limb—that is, to raise it from the bed and fix it in such position that all the discharges from the limb would be free into a vessel, so that there would be required no change, the object being, if possible, to put him into a position where there would be perfect rest to the limb and to the bones, and at the same time perfect cleanliness secured by the dressings. Extension was made at his foot by means of a weight; we had to give him ether, because the pain was so great that we could not adjust the bed nor the dressings while he was sensible. This answered a very good purpose for a time, but still the limb would get out of position—that is, the foot would turn inward—in spite of all we could do with that kind of dressing, and finally I determined to give him ether again, and then put the limb in a plaster of Paris splint, that is, envelope it with plaster of Paris dressing—bandages which, when they hardened, of course would make an immovable dressing. While under the influence of ether we brought the limb down into a straight and proper position, and afterwards it would be maintained there by the dressings that would be applied. That was done and the limb brought down to the same length as the other while he was under ether, and it was maintained in that position while the plaster of Paris dressings were put on. When they hardened (they hardened by the time he came out of the ether) the limb was fixed so that the foot could not change its position, nor could the limb shorten; it had to remain in the position in which we fixed it. He went along very well with those dressings. The limb maintained its full length and its proper position for some little time; I don't know how long; but after a little the dressing began to break around his body by his moving, as it sometimes will, and that was strengthened by putting on more plaster dressings—not taking off what we had on on account of the difficulty of managing the limb; strengthened in that way, it went on until I went off duty in February. The limb had full length, the discharge had diminished very much, and the patient was improv-

ing. When I first went on duty he was so feeble I had no
57 anticipation of his getting through; I thought he would be exhausted by the discharge and the pain, and he could not stand any kind of dressing; but he did improve under that dressing that I described, and when I left him, the first of February, his limb was in good position and full length. I never saw him afterwards that I recollect—after I went off duty, when my term expired. What the ultimate result was I never knew.

Q. I will ask Carey to stand up; let the doctor examine your leg.

A. I don't know as I can tell anything more than it appears to be shortened very much.

Q. Is there any chance, in your opinion, of his being able to bend that?

A. I could not tell without taking off his clothes and examining it; I suppose the knee would be stiff—the wound was very near the knee; the bone was broken very low down, and a great amount of inflammation went to the knee.

Q. Is there any chance of the injured leg reaching the length of the other one?

A. O, no.

Q. And his condition, then, now is permanent?

A. Yes, sir; no doubt of that.

Q. What was the degree of pain and suffering that Carey underwent while in the hospital, as far as you know?

A. It was very unusual; it was exceptionally great; I never saw a man suffer more pain from a fractured limb than he did.

Q. Did the pieces of the bone stick through the flesh?

A. They didn't when I was attending him; I understood they did before.

58 Cross-examined:

Q. Did I understand you to say that when you left him, or when you saw him last, his leg was in such a condition, so far as you knew and could tell, that he would be able thereafter to use it again if it continued in that condition?

A. Well, yes; it was full length, and in a fair way of uniting after a time.

Q. So that he would be able to use the leg again, so far as you could tell?

A. Yes.

Redirect:

I have nothing further to say, unless I qualify that remark, that probably he would have no use of the knee, so far as bending it is concerned, but he could probably walk on it if it was the usual length, of course.

Recross:

I should regard it as a certainty that he would not have the use of the knee.

The plaintiff, further to maintain the issues on his behalf, recalled JOHN A. BURKE, who testified as follows:

I was present when the plaster Paris splint was taken off; I know the reason why it was removed, because the contraction of the muscles was so great; the plaster of Paris splint was put on for the purpose of keeping up extension and keeping the foot in its proper position, and it did that by pressing on all parts of the leg—on the prominent points particularly; it kept it in position and kept it in the proper length; but the contraction of the muscles was so great that
59 it made the pressure so great on the prominent points; that suppuration set up, and for that reason it had to be removed; the pressure was so great from the contraction against the hard plaster of Paris that it had to be taken off. That was the proper treatment to do at that time, in his condition at that time.

Cross-examined:

When Dr. Smith left it the leg was in this plaster of Paris that was removed after he had gone.

Redirect:

For the reasons which I have stated.

By the COURT:

Q. The whole leg was enveloped inside of this plaster of Paris?
A. Yes, sir; the plaster of Paris is put on outside of the leg; the extension is made by means of pulleys.
Q. It makes a solid case?
A. Yes, sir; and it keeps the leg extended by pressure on the ankle joint and at the prominent points, and as Carey grew stronger the contraction of muscles became greater and he was unable to bear the pressure on the prominent points; the tissues became soft and dead and discharged, and for that reason it had to be taken off.

The plaintiff, further to maintain the issues on his behalf, called CHARLES PHELPS, who testified as follows:

I am a practising physician in this city, and have been for twenty-five years; my duties called me to St. Vincent's Hospital in
60 the year 1880; I was there in the month of November in that year.
Q. Do you recollect the case of Patrick Carey, who was brought there on the third of November from the steamship Batavia?
A. I recollect the man.
Q. Is this the man (pointing to the plaintiff)?
A. That is the man, I think; yes, sir.
Q. Do you recollect the consultation which took place over his case?
A. I know there was a consultation called; yes, sir.
Q. Do you recollect the result of the consultation?
A. It was thought desirable that the limb should be amputated; I recollect he refused to have the operation performed and preferred

to take the chances of saving his life and his leg at the same time, so the effort was made to give him the best possible leg under the circumstances.

Q. It was the opinion of the physicians engaged in the consultation that his life depended upon the amputation?

A. Not as I recollect; I recollect that in the opinion of the surgeons at the time the chances were much better if it was amputated. I was the attending surgeon of the hospital at that time. He was under my charge during the month of November. I don't recollect the details; I recollect, in a general way, that there was a compound fracture of the left thigh, low down; that there was a great deal of bruising and laceration of the muscles and a great deal of hemorrhage from the parts about the fracture; that he was put up in what is called Lister's apparatus, the principle of which is exclusion of the air.

Q. Is that another name for extension?

61 A. No; extension was applied at the same time, and the parts were hermetically sealed from the air, and this treatment was continued for a week. During that week the consultation had been called, amputation had been recommended, and he had declined the operation, and we were doing the best we could to save his leg. I think during the time I remained on duty the extension was continued, and that his condition varied from day to day, and that his condition was precarious; and after that time, although I had some knowledge of the case, it was not personal. I didn't see him from day to day.

Q. What is your opinion of the degree of suffering that Carey underwent during that time?

A. I have no doubt he suffered a great deal of pain; I don't know just how to express the amount of it; he can do that better himself. Of course it was a very serious and painful accident, and he had to suffer a great deal of pain; I don't know how much.

Q. Did you ever have a worse case under your care?

A. Yes, sir; I have had them die.

Q. But no case as bad as his that ever lived?

A. I don't know about that. Still it was a pretty bad case, and the chances were he would lose his life if he didn't submit to the operation.

Cross-examined:

I was not there when he left the hospital.

The plaintiff, further to maintain the issues on his behalf, called JOHN CARROLL, who testified as follows:

62 I reside at 562 Greenwich street, in the city of New York; I am a longshoreman. I am at present employed at no place in particular, only where I can get employment along the beach. I was in court this morning before recess and heard the plaintiff, Patrick Carey, on the stand referring to the falling of a tub on him in the hold of the steamship Batavia, on the third of November, 1880. I was present in the hold of that vessel at that time. I did

not see the tub fall on Carey. I saw the rope after the fall; I did not examine it; I noticed the end of the rope in the hold after the tub struck Carey; I saw the end of the rope. All the description that I can give of it, it seemed to me that it pulled apart like that (indicating); the end came down scattered after the tub fell; I couldn't tell how much of the rope came down, because I ran over and picked up the man and helped to put him in the skid. I called for help for to help put him in the skid and hoist him on deck, and then helped carry him to St. Vincent's Hospital. I noticed his leg at that time.

Cross-examined:

I am in no particular employ at present; wherever I am hired I go to work there. My business is longshoreman. I had been employed by the Cunard Company at this time, November, 1880, about eighteen months. I remained in their employ afterwards, I couldn't say how long; about six or seven months afterwards; and since that time I have been in their employ sometimes.

Q. What were you doing in the hold of the Batavia?

A. Shoveling coal.

63 Q. As I understand you were shifting coal from the hold to the steerage deck?

A. I couldn't say where it was shifted to. I was shoveling into tubs; I couldn't say exactly what time it was he was injured; it was some place about half past ten; between that and eleven. I went to work at seven o'clock. I did not work there that night after the time of the accident; I ran over to pick Carey up; I was working in the wing of the ship; I was facing where the work was, at the coal, facing down at the time the tub fell. I heard the tub fall; I heard the noise and turned around and saw the man and rushed to his assistance to pick him up. I saw the tub come, and the rope; the tub came first and the rope fell afterwards. I don't know how many strands the rope had; I could not tell how many strands of the rope there were at the end that I saw.

Q. When you say that the end looked scattered, do you mean that the strands looked separate from each other?

A. Yes, so as that it broke—pulled apart.

Q. The strands were separated?

A. Yes, it was all scattered.

Q. Was the rope twisted together?

A. Understand me; it wasn't a clean break across so as to cut it with a knife or such a thing as that; but it pulled right apart and came scattered down in the hold. The end of the rope was not twisted up, the strands were separated. I did not notice the color of the rope, I didn't know the color exactly. I saw the end of the rope; when I went there to take hold of the man I saw the rope.

Q. Was it together in a bundle or coiled?

64 A. Yes, sir; it fell right down on the tub; it was not falling when I saw the end, it had fallen down; it was not in a coil; it was scattered all around the tub. I couldn't say how much rope there was, I didn't measure it.

Q. Since the accident happened have you talked with any one with regard to this rope?

A. I might have talked about it, of course.

Q. With whom have you talked?

A. Why, several longshoremen.

Q. Any one else?

A. No, sir.

Q. No one at all?

A. No, not unless some of my companions or workingmen around.

Q. You haven't mentioned the fact of the end of the rope that you saw to any one besides your companions?

A. No, only in communications like that; we might be talking about it, that is all.

Q. Who first called your attention to the end of that rope?

A. No person; only what I saw myself.

Q. Who was the first person that you spoke to about it after the accident?

A. I can't remember that.

Q. Do you know when it was?

A. No.

Q. Where was this rope lying?

A. It was lying on the bottom of the hold, bottom of the ship, around the tub, when I first saw it after it fell, the tub was lying on its side. Patrick Carey was lying alongside of the tub.

Q. On which side of the hatch; right or left, facing forward?

A. On what we call the offshore side.

Q. And there is where you were working shoveling coal?

A. Yes, sir.

65 Q. You didn't pick this rope up to examine it; you simply glanced at it casually?

A. As soon as I went over and picked up the man I looked at the rope, certainly, when I saw it lying there. I didn't take time to examine the rope or anything else, because I thought too much about the man at the time. It was the accident I was looking after, and not the rope.

Q. Was it dark down in the hold, or was it light?

A. There was lamps there.

Q. Was it dark or light?

A. You can imagine what it was with lamps there.

Q. Could you see to distinguish a man's face from one side of the hold to the other?

A. If I was thoroughly acquainted with the man I might.

Q. Could you see pretty near across the ship in that hold?

A. Yes; you could see a man's form. I couldn't see distinctly, unless I was well acquainted with him, to know who it was.

Q. You could see that it was a man?

A. Yes.

Q. When this tub fell did it raise a dust?

A. I don't know; I couldn't say. I remember there was coal in the tub after it had fallen. There was coal in the hold of the ship

which had fallen out of the tub. When the tub fell over on its side, after striking, some coal fell out on the bottom of the ship at the time. They called it Welch coal; that is all I know about it. In shoveling coal it raised a dust. I couldn't say how far away from Carey I was when the tub fell upon him; I might be about 8 feet, perhaps. I couldn't swear how far from the end of the rope
66 I was when I saw it; I didn't measure the distance; I might be four feet or so—something like that.

Q. Did you notice whether there was any other tub under the hatch at this time?

A. Yes; there was several tubs in the hatch; some of them full and some of them empty.

Q. When these tubs are lowered down do they run on a rail down in the hold of the vessel?

A. Yes; sometimes, according to the length of the hold. There was no rails there that night.

The plaintiff, further to maintain the issues on his behalf, called THOMAS EASON, who testified as follows:

I reside at No. 60 Clarkson street, in the city of New York. I am longshoreman. I have been employed as a longshoreman, I guess, nigh three years. I was employed on the 3rd of November, 1880, by the Cunard Steamship Company. I was in the gang that were hoisting this coal from the hold of the Batavia on to the steerage deck. I was on the steerage deck at the time; that was on the same deck with Bennett. I was gathering up the slack coal.

Q. Who was with you there?

A. A man named Charlie O'Brien, on the outside of me. That is all. Of course there was the men wheeling the coal; they were there, too.

Q. I want the names of every one there, and what they were doing, so far as you remember, on the deck where you were.

A. Joe Donnelly, John Stafford, Charlie O'Brien, Mike Reilly, Charlie Lawson; I think that was all, besides Bennett. At the time the accident happened I was just standing waiting,
67 and of course every tub that come up I had to pick up all the coal that came out of the tub and empty it into the barrel, and I saw the tub go down when the fall gave way; I was about three or four feet from the hatch when it carried away; I saw the rope go down beside the hatch.

Q. Did you see the end of the rope that went down?

A. No, sir; I hadn't a chance to see that.

Cross-examination:

None.

The plaintiff, further to maintain the issues on his behalf, called ROBERT GEORGE HANN, who testified as follows:

My business is life insurance expert and actuary; I have been such about fifteen years.

Q. What is the expectation of the life of a man, according to the Northampton mortality table—a man aged 31?

A. The expectation of thirty-one, by the Northampton mortality tables, would be twenty-seven decimal seventy-five (27.75) years.

The plaintiff, further to maintain the issues on his behalf, called FRANK BENNETT, who testified as follows:

I reside in Jersey City; I am night watchman on the Red Star Steamship Co., Jersey City; on the third of November, 1880, I was occupied on the Cunard dock as sailor man—rigger; do anything I could do about the yard. I was in the gang that were hoisting this coal from the hold, on the steerage deck; I was stationed at the hatch, on the steerage deck, port side; I was attending to the
68 whip, the coal whip that hoists the coal up. There were two whips; I was attending to the port side; I did not rig that fall that night; I don't know who did.

Q. What were you doing at the hatch on the steerage deck?

A. I was steadying up the tubs of coal that was coming up, that was hoisted up, and helped to dump them in a barrow.

Q. Will you be kind enough to state, along about half past ten or eleven o'clock, just what you saw?

A. Well, all I know is, as I was steadying the tub of coal up the fall carried away above my head and I saw the end coming past me before my eyes; just had time to step back and clear myself; that is all I did. I saw the rope going down; the rope was broke; I saw it was carried away, and the end passed beside my face; that end looked like an old swab.

Cross-examined:

I went to work that evening at seven o'clock.

Q. Are you sure about that; didn't you go to work at six; have your supper at five and go to work at six?

A. No, sir; I am sure of six; I went to supper at six and came back at seven.

Q. How far was the steerage deck above the bottom of the hold, about?

A. Fifteen feet, I suppose. There was another man stationed on the steerage deck on the other side of the hatch; his duty was just the same as mine—to attend to the whip; not the same whip as I had; he had his own. I steadied the tub as it was ascending at the time of the accident; the tub had not got up to the steerage deck at that time.

69 Q. How far below the steerage deck was the tub at that time?

A. I couldn't exactly say how far it was below; it was in sight; I saw it and that is all.

Q. About how far, three or four feet?

A. Three or four or four or five feet, something like that; it was pretty near up.

By the COURT:

Q. By the whip you mean the rope?

A. I mean the tub of coal.

Q. By the whip you mean the fall—the rope?

A. I understand the gentleman asked me how far the tub was from the hatch where I was standing. I say three or four or four or five feet; a few feet below the coamings I was standing on.

Q. How light was it there?

A. Well, there was a great deal of dust in the hold at the time this happened.

Q. That dust was rising?

A. Well, I don't know exactly whether it rises or falls; I suppose it rises from the bottom and gets out. I could see distinctly across the hatch where I was standing; right across. There were lamps there; how many I don't know. Across the hatch there I suppose was about seven or eight feet.

Q. And on which side of the hatch were you—the offshore or inshore side?

A. On the inshore side.

Q. Could you tell how much of the rope fell past your face?

A. No, sir; I couldn't say how much; I suppose it would be about six or seven fathoms. Seven fathoms would be forty-two feet, six feet to the fathom.

Q. Do you think it was as much as twenty fathom?

A. Well, I said I thought it was six or seven fathom; I
70 can't say it would be twenty; that is the best I can give.

Q. It passed your face very quickly, didn't it, in falling?

A. Well, yes, sir; it did.

Q. You didn't have time to examine any portion of it very closely?

A. I hadn't time to do that. I didn't examine any portion of it as it passed my face; I could not tell how many strands there were on the rope.

Q. Could you state whether the strands were separated?

A. What; the broken end?

Q. Yes; the end that you saw?

A. Yes, sir; they were not closed.

Q. They were separated?

A. Separated.

Q. And for how long a distance do you think they were separated?

A. It is very hard to say exactly.

Q. I just want your best recollection.

A. I suppose about two feet and a half or three feet; it was all fagged out—the end was all fagged out when the end passed my face.

Q. And the strands you think were separated two or three feet from the end?

A. From the end, yes; I don't mean in width, but I mean from the end of it.

The plaintiff, further to maintain the issues on his behalf, called JOHN S. O'BRIEN, who testified as follows:

I live in New York; my occupation is japanning and painting at present; my occupation on the 3rd day of November, 1880, was longshoreman and rigger; I had been engaged in that employment about two years and a half; I was at that time in the Cunard
71 Steamship Company's employ. I was engaged that night at hoisting coal; that is, at the hoisting apparatus when we were hoisting coal; I was stationed in the scow alongside of the ship; I saw that apparatus—that gear part of it; the part that carried away was under my eye.

Q. Be kind enough to describe to the judge and jury the fall—the whip—the apparatus.

A. I could only describe it as I did before.

DEFENDANT'S COUNSEL: I suggest that inasmuch as the witness says that the part that came under his eye was the part that carried away, unless he saw the whole of it he cannot describe the entire fall.

The WITNESS: I didn't stand where I could see the whole of it from one end to the other, but I saw as far as I could see of the fall from where I stood.

The COURT: Describe all that you saw.

A. The way it was rigged, it was connected to a gaff or a derrick. This derrick was connected to a post or perpendicular—a mast like. On this gaff was lashed a block with a hook or strap, whichever the case may be, and the fall rove through this block and led down to the scow, and then rove through another block on the scow. Whether this rove through the third block on the ship's rail I disremember. Sometimes we used to have it rove that way and sometimes we didn't; but it was through two blocks; I am sure of that. One block was placed on the gaff and the other was placed on one end of the scow.

Q. Wouldn't it necessarily require to pass through another pulley or block to go down to the ship's hold?

72 A. Not to get down to the ship's hold; but sometimes we used to have a pulley just for a mere lead.

DEFENDANT'S COUNSEL: I object to that. Let the witness describe what he saw that night.

Then from the block that was on the end of the scow which the fall led through it led to a drum or to a round piece of machinery that was connected to an engine, of course; and this rope was connected onto this drum; that is what it is called, or that is what we commonly call it; I don't know any other name for it; and I stood by this drum with two brakes, which one was for hoisting up and the other for lowering. I was stationed at the drum. My duty was to go ahead with the machinery when I got the signal from the parties that was attending to the tubs in the ship's hold or deck; that signal was a piece of wood with some pieces of iron connected

to a line, and that was rove through pulleys and led into the scow where I could see it. The signal that night was a piece of board or wood with some pieces of iron connected to it to weigh it down. When he was ready to go ahead in the ship the man that stood at the hatch—the hatch tender—he used to pull this rope, and this here piece of wood gave a jerk up, and that signified for me to go ahead.

Q. Was there any mark on the rope itself?

A. Yes, sir; there was a mark on the hoisting rope. When that mark came to a certain place on the drum it signified for me to stop; the tub was then high enough for to dump. The string around
73 the rope was a signal to me to stop when it came to a certain place on the drum. I did not rig that fall that night; I don't know who rigged it.

Q. Where were you when you understand that it was rigged?

A. I was at home. I didn't see it rigged before I went home. When I returned from my supper it was rigged. Then I went to work in the scow.

Q. What attracted your attention when you went to work?

A. There was nothing particular attracted my attention when I went to work. I went to work at seven o'clock.

Q. How soon did anything attract your attention?

A. Awhile after eight o'clock; shortly after eight o'clock I saw the rope chafed partly when the mark was up to the place where I should have to stop it—where I had to stop it. It was chafed about from five to six feet, I suppose; along about the center of that was the worst part.

Q. That came under your notice in the operation of the fall?

A. That came under my notice when the tub was high enough—when the mark was to its place.

Q. How much worn was it?

A. I couldn't say exact; there was several yarns worn off; it was fagged out considerably; it was considerably.

Q. Did it require any inspection to discover this thing?

A. No; I didn't inspect it particularly; I saw it just the same as I might see the gaff in front of me; I saw it, that is all. It attracted my attention.

Q. What did you do then?

A. I done nothing. I continued to hoist till Mr. Gerraghty, the foreman, came down onto the scow.

74 Q. Now go on and repeat again what you were going to say about Mr. Gerraghty.

A. I was going to say that I spoke to Mr. Gerraghty when he came down on the scow, and told him that the rope——

DEFENDANT'S COUNSEL: I object, on the ground that any conversation with Mr. Gerraghty in the present state of the testimony is incompetent to bind this defendant, and that it is not notice to the company.

The court overrules the objection.

Defendant's counsel excepts.

I spoke to Mr. Gerraghty and told him that the rope looked bad—looked chafed—looked as if it wouldn't last much longer to hoist with. Of course I couldn't do no more but tell him.

DEFENDANT'S COUNSEL: Never mind your reasons or arguments; just state the facts.

He told me to go ahead with it longer and continue to hoist, and I did so. Then he came down again about an hour or so afterwards—I suppose a little more than an hour, I couldn't be positive now about that—and I spoke to him again about the rope; it was then getting worse, and I told him that it looked worn, and I was kind of afraid to hoist any longer—felt timid like; I was afraid there was going to something happen—that the rope was going to carry away or something, and might hurt some one; I felt that way.

DEFENDANT'S COUNSEL: Q. Did you tell him that?

A. I told him that I felt afraid it might carry away. He took the rope away. As I said before, whether he steeped it
75 when I spoke to him the first time or when I spoke to him the last time I disremember; but he steeped the rope during the time.

Q. What is steeping?

A. He dipped the bight of the rope that was bad in water, but whether he done it the first time I spoke or the last time, I disremember. So I continued to hoist awhile after I spoke to him the last time, and shortly after that it carried away. I saw Gerraghty steep the rope.

Q. You have had experience in ropes and the way of taking care of them?

A. Yes, sir; I have had a great deal of experience in that work. I have worked amongst rope pretty near since I was fourteen years of age up to a short time ago.

Q. What is your opinion in regard to the propriety of steeping that rope at that time?

A. I don't know; I can't give you none; I don't know as it does it any good.

Q. Well, would it make it any better?

A. It didn't use to, in my opinion.

Q. Does it have any effect on the rope?

A. It swells the rope; tautens it up for the time being.

Q. Then for the time being it makes it a little stronger?

A. It may be for a few minutes, perhaps.

Q. What are the after effects of steeping?

A. It will wear just the same.

Q. What do you mean; wear better or wear worse?

A. It will fag quicker, if anything, if the rope is old.

Q. Does the action of the water on the rope have a tendency to rot it?

A. It does if it lays long enough.

76 Q. How long was this rope from the drum to the hold where Carey was stationed?

A. I can't exactly say, but I think, as near as possible, it was thirty fathom; about that; might have been more or less. That is, this rope was somewhere around one hundred to one hundred and fifty or sixty feet, in my estimation. The distance on that ship from the hook on which Carey hooked the tubs to the place where this rope was worn away was about one-third of the rope, as near as I could tell; about one-third of the rope from me; two-thirds from the hook.

Q. How far did that defective part of the rope go that went from the drum when the fall was descending?

DEFENDANT'S COUNSEL: I shall not attempt to prove that the defective part of the rope descend*ing* into the hold within Carey's sight that night.

Q. How long would it have taken you to have changed that rope?

A. The way I should have changed it, it wouldn't have taken me over fifteen minutes at the outside.

Q. Could that rope have worn down to that condition on that fall, passing through those pulleys, between the time when they commenced to hoist that coal and the time when the rope broke?

DEFENDANT'S COUNSEL: I object to that on the ground that it is not competent to apply hypothetical question to the facts of any particular case.

PLAINTIFF'S COUNSEL: That I concede; but it seems to me I may ask him whether that very rope would have worn down during that very time.

77 THE COURT: I think it is competent, if the form is not objected to.

DEFENDANTS' COUNSEL: I do not object as to the form, but as to the competency of the question, and to your honor's ruling I will take an exception.

Q. I will change the form of that question a little. Could that rope have worn down to that condition on a fall, passing through those pulleys, from the time they commenced to hoist to the time it attracted your attention?

DEFENDANT'S COUNSEL: I take the same objection to that question—to the substance, and not to the form, and also that it is indefinite.

Objection overruled.

Defendants' counsel excepts.

A. It is a very hard thing for me to say.

Q. I want your candid opinion about it.

A. The only thing I can say that had the rope been new it would not have worn so quick; but as the rope was worn before, it seemed as though it wore out quicker, and when it came under my notice I saw it was chafed. I didn't see the rope break, but I saw the recoil and felt the recoil on the drum. The drum went quicker when it carried away first, until I checked it, and then I pulled in

the rope until I got to the end of the part that was onto the scow, and then I saw the end where it broke and when it carried away—the fagged ends.

Q. When it parted, then, the drum revolved more rapidly than before?

A. Until I checked it; slightly—not very much faster; sufficient to notice.

78 Q. Then the rope came back to where it had parted?

A. I hauled it in until I came to the end of it.

Q. Was that end the place where you had noticed the defect in the rope which you have described? Describe that end of the rope which you hauled back towards the drum.

A. Well, it was a fagged end, like any other rope when it breaks; one strand would be a little shorter than the other, and the yarns were fagged out.

Q. How near was that end to the signal mark on the rope—to that string tied around the rope?

A. One end of the chafed part came very near to the signal that was tied around the rope, and the other end of the chafed part was about five or six feet from that, as I said before, and the break was in the center of the chafed part. They didn't go on hoisting coal that night after the break, to my knowledge. I went home after that.

Q. Who was on the scow with you?

A. Joe Redmond and John Higgins. Joe Redmond, he was tending to the boiler of the engine, looking after the engine, &c., and John Higgins, he was doing the same work I was; similar work on the opposite side of the scow on the other drum. There was four drums. Two was at work that night only.

Q. Did you see the rope after that?

A. I saw the other end of it on the deck, the end that went down into the ship's hold.

Q. How long afterwards?

A. I couldn't exactly say how long; as soon as I got up on the deck out of the scow, and when it was hauled up out of the

79 hold; a little time; I couldn't describe the time.

Q. How did that end look?

A. That looked the same as the other end, pretty much fagged out—one strand a little shorter than the other.

Cross-examined:

I went to work that night about seven o'clock; I think it was a little darkish; I think it was getting dusky, if I remember rightly.

Q. Were the lamps lighted?

A. I don't remember.

Q. Do you remember anything about the lamps?

A. No; I don't remember anything about the lamp; when I went to work, but some time after, of course we had to have a light; I was not there when the fall was rigged; I did not see it rigged.

Q. Did you see the entire fall when you went to work?

A. O, yes, sir; I saw the entire fall.

Q. It was light enough to see the entire fall?

A. Well, you could see that almost in the dark, if you were near enough to see it.

Q. From the position that you were in, could you see that entire fall?

A. Not from one end to the other.

Q. At any time that night did you see that entire fall?

A. No; only after I saw the fall carried away; no other time.

Q. You didn't see the entire fall rigged?

A. I saw the entire fall rigged before I went on board; at the time I went down in the scow.

Q. Did you see the entire fall rigged?

A. Yes, sir.

Q. How many pulleys were there?

A. There were two; I think there were three.

80 Q. One pulley on that scow?

A. Yes, sir.

Q. That is, a block stood on the front part of the scow?

A. One end of it; I couldn't exactly tell which was front and which was back.

Q. Do the falls work both ways on that scow—through both ends of it?

A. No, sir; through one end; that is, there is pulleys on one end; blocks connected on one end only.

Q. How was that end of the scow pointing, into the river or into the street?

A. Out into the river.

Q. And on which side of your scow was your drum?

A. On the left-hand side with my face to the river; it was the farthest away from the ship.

Q How long is this scow?

A. I don't know.

Q. Can you give me any idea?

A. I don't know as I could.

Q. Is it forty feet long?

A. I couldn't say; I never measured it.

Q. You haven't any idea at all about its length?

A. No; I don't know as I could give any particular estimate of the length.

Q. Have you any idea of the width?

A. No, sir.

Q. How many times have you worked on that scow?

A. I couldn't tell you; I worked there often.

Q. Very often?

A. A good many times; yes.

Q. That scow is housed in all over, except a little place in front where these pulleys are?

A. There used to be two doors in front.

Q. I know, but the house is there?

A. Yes, sir.

Q. Except that much where the pulleys are, in front?

81 A. Quite a large door.

Q. How much of the scow is in front of where the partitions are?

A. About three feet probably from the partition to the end; perhaps about that.

Q. In the partition in the end there are two square windows, are there not, or about square?

A. There is doors like.

Q. Well, doors; and those are open when the drums are working?

A. Yes, sir; sometimes; sometimes the parts of them are closed.

Q. And the falls lead over those openings, whatever they are?

A. Yes, sir.

Q. From these openings to the drum that you were working on is how far?

A. I could not exactly say how far.

Q. I don't want to know exactly; give me your best judgment upon it.

A. As near as I could judge, about ten feet; perhaps more.

Q. How large is that drum?

A. I disremember now, but I think it is from about a foot upwards in diameter.

Q. How much of the rope would be wound around in one turn?

A. If the drum is a foot and a half in diameter, why it is three times that much around.

Q. Will you calculate it for me?

A. Well, I am a poor calculator.

Q. Would it be four feet and a half?

A. I suppose somewhere about that.

Q. How many turns were around that drum when the tub was down in the hold?

A. I couldn't exactly say, but somewhere over two or three turns.

Q. When you worked the drum which way did you face?

82 A. I faced towards the river.

Q. Out towards this?

A. Sometimes I could face either way.

Q. With your face or your back to this opening?

A. Partly; I was kind of standing sideways towards the opening.

Q. And you were watching this mark, were you not?

A. I had watched that; that is the mark I had to go by.

Q, And you did watch it?

A. Every time; I had to.

Q. So that when the rope came in to you (this ten feet which came in the scow) you could see that every time?

A. Yes, sir.

Q. And you did see it.

A. I did.

Q. What was outside of the scow you could not say?

A. Not while I was inside.

Q. And did this mark which you speak of come right up to the drum?

A. Well, it used to come very near on top of the drum, according to where we used to place the mark, you know.

Q. On this occasion did it come right on top of the drum?

A. I won't be positive.

Q. But very near it?

A. Very near.

Q. So that every time it came in you could see it?

A. Yes, sir.

Q. And did you see it?

A. Yes, sir.

Q. How far was it from the pulley on the scow to the second pulley?

A. I couldn't exactly say. The distance from the scow was probably only a foot or a foot and a half from the level of the water to the top of her where the pulley was; perhaps from a foot to
83 a foot and a half; I wouldn't be exactly sure, because I never measured it, and then there is the ship's side; I couldn't tell you the height of the ship, and then I couldn't exactly give you the height from the ship to the derrick.

Q. Give me some idea how far it was from the first pulley on the scow to the first pulley beyond.

A. It would be very hard to give an estimate of that distance, because I disremember how far the scow was ahead of the vessel; the distance varies.

Q. Do you think it was as much as forty feet?

A. I don't think it was as much as that.

Q. Twenty feet?

A. I guess it was all of that, and over.

Q. Well, say thirty feet; do you think thirty feet would be about right?

A. More or less.

Q. More or less means anything.

A. It was either under or over thirty feet from the pulley on the scow to the pulley on the derrick.

Q. And you would say about thirty feet?

A. About that; it may be under and it may be over.

Q. How far from the pulley to the second pulley?

A. Out to the scow?

Q. No, no; from this second pulley that we are speaking of to the third pulley.

A. There was no third pulley, to my remembrance.

Q. Then from this pulley, which was thirty feet from the pulley on the scow, the fall led directly into the hold?

A. Sir?

Q. Do you mean to say that from this pulley on the scow the fall led through one pulley more and then directly into
84 the hold?

A. Yes, sir; that is my recollection of it. Yes, sir.

Q. And you think this fall was about one hundred and eighty feet long?

A. I didn't figure it up in feet; about thirty fathom, or thereabouts, more or less.

Q. When was it that you first noticed that anything was the matter with this rope?

A. A little after eight o'clock, or thereabouts.

Q. Wasn't it as late as nine?

A. It might have been; I won't be positive; but it was after eight—a little after eight.

Q. You had no clock by which to tell the time?

A. No, sir; I only went by judgment—guess.

Q. You think you had been at work over an hour?

A. Yes; I thought I had been at work over an hour when I noticed it first—about that.

Q. When you did first notice it you didn't stop the machine?

A. No, sir.

Q. You didn't send word to any one?

A. No, sir.

Q. How long after you first noticed that there was anything the matter with the rope was it that Mr. Gerraghty came down?

A. Shortly after; not very long.

Q. And you don't remember what occurred, then, further than that you spoke to him of the condition of the rope?

A. No; I don't remember.

Q. You don't remember whether he took that rope off of the drum, then, or not?

A. No, sir; I don't remember.

Q. How long before the fall carried away was it that you say Mr. Gerraghty was down on the scow the second time? Give
85 me your best judgment of the time.

A. It wasn't long before it carried away that I spoke to him the last time.

Q. Had you sent after any one to come down this second time?

A. No, sir.

Q. When you noticed, as you say, that the rope was getting worse, did you stop the drum?

A. No, sir.

Q. You don't mean to say that the rope was rotten, do you?

A. No, sir.

Q. And you don't mean to be understood as saying that dipping it in the water that night rotted it so as to make it weaker that night?

A. No, sir; if it had been good before.

Q. Do you mean to say that in the condition that that rope was when it was first dipped in the water such dipping it rotted it?

A. No, sir.

Q. Can you say that such dipping did that rope any harm?

A. Well, after a few hoists it would do it no good.

Q. Can you say that such dipping did that rope any harm that night?

A. It would do it more harm than it would if it had kept dry, as far as my judgment goes with a rope.

Q. Then, do you mean to say that dipping the rope that night, as you say Gerraghty did, did it any harm for use that night?

A. It might have.

Q. Do you mean to be understood as saying it did?

A. I won't be positive.

Q. Is it your opinion as an expert in ropes that it did that rope any harm that night?

A. It didn't do it any good—as an expert.

Q. Will you please answer my question? I ask you now
86 as an expert in ropes whether, in your opinion, dipping the rope in water that night did it any harm for use that night?

A. It would do it harm for use.

Q. Did it?

A. I don't know; I can't say that, whether it did or not.

Q. When you saw the ends of this rope, as you say, were the strands separated?

A. Partly; yes, sir.

Q. For how long a distance from the ends were they separated?

A. I didn't measure them.

Q. How long should you judge?

A. From perhaps six inches to a foot.

Q. Not over that?

A. Might have been over; more or less, I won't be positive.

Q. Wasn't it as much as two or three feet the strands were separated?

A. I couldn't say.

Q. How many strands were there in the rope?

A. That I didn't measure; I disremember whether it was a three or four stranded rope.

Q. When the fall parted you say the drum revolved more rapidly?

A. Slightly; yes, sir.

Q. How many turns did it make?

A. I didn't count them.

Q. Tell me your best judgment.

[A.] I can't tell you; I could give you no idea.

Q. Did it make over one?

A. I couldn't tell you.

Q. How long was it after the fall parted that you stopped the drum?

A. A very short time.

Q. Was it a minute?

A. Perhaps; about that; more or less.

Q. Can you say how many turns the drum made?
87 A. No, sir; I couldn't; that is impossible.

Q. You say the end didn't recoil into the scow?

A. No, sir; not the whole of the end didn't; that is, not the whole of the part of the end of the rope.

Q. No; I mean the end of the rope.
A. No; I hauled the end in.
Q. Had it dropped into the water?
A. Yes, sir.
Q. And you hauled it in from the water?
A. Yes, sir.
Q. How long did it take you to haul it in?
A. I don't know; it didn't take very long to haul in two or three fathoms.
Q. How many hauls do you think it took?
A. I couldn't tell you.
Q. How much of the rope do you think you pulled in?
A. I couldn't tell you that either.
Q. Over two feet?
A. About one-third of the rope.
Q. You pulled in about one-third of the rope?
A. Yes, sir; not one third of the whole of it.
Q. No; but one-third, or what was left?
A. Besides what was around the drum.
Q. Do you know whether you had used that same rope to work before?
A. I couldn't say whether I used it or whether it was this; but I know it had been used some time before, but how long I couldn't say.
Q. Do you remember being on the coal barge the week before?
A. I don't remember.

Redirect:

Q. What, in your opinion as an expert, should have been done with that rope?
A. It should have been changed.
88 Q. What do you mean by changed?
A. Getting another rope; a better rope.
Q. How long had you been in the employ of the Cunard Steamship Company?
A. Somewhere over a year; about a year, or somewhere about that.
Q. During that time who was your foreman, your immediate foreman; did you have the same one at every job or different ones?
A. The same as we had that night.
Q. Generally speaking, did you always have the same foreman?
A. We had Mr. Craven.
Q. Who was he?
A. He was the foreman and stevedore on the dock—all over.
Q. Was there any one there in command superior to him?
A. Mr. Storey.
Q. What was his rank?
A. As far as I understand, he was superintendent of the dock.
Q. Did that embrace everything?
A. When we say dock—that is, when we call it dock—we embrace

everything, ship and everything when they are in there, I suppose; I don't know.

Q. Who gave you directions from time to time in your avocation there?

A. Sometimes Mr. Craven would give us directions, and sometimes Mr. Gerraghty would give us directions; sometimes another foreman that is there used to give us directions, owing to what work we were at.

Q. Did Mr. Storey ever give you directions?

A. Sometimes, yes, sir; very seldom, because he used to deliver it to his foreman.

Q. Sometimes you got directions from Mr. Craven, I under-
89 stand you?

A. Yes, sir.

Q. And who else?

A. Mr. Gerraghty and another foreman that used to be there used to give us directions.

Q. Was this other foreman there on the third of November?

A. He was in the day there; yes, sir.

Q. You mean this other foreman you have mentioned whose name you have not given?

A. Was he there that day?

Q. Yes, sir.

A. He was there in the day time, but not that night.

Q. And you say sometimes Gerraghty gave you directions and sometimes some other foreman whose name you didn't give?

A. I referred to the third foreman, as we called him.

Q. What was his name?

A. I don't know as I can tell.

Q. Was he there that night?

A. No, sir.

Q. Did he give you any orders that night?

A. No, sir; not to my knowledge.

Q. Did you see Mr. Craven about the dock that night after you came back from supper?

A. He might have been around the dock.

Q. Did you see him?

A. I don't remember whether I saw him or not.

Q. Do you remember whether you saw Mr. Storey?

A. I don't remember seeing him.

Q. What was your duty in regard to the condition of the gear?

A. My duty was to do whatever I was told, it didn't make any difference—what I could do.

By the COURT:

Q. Supposing an accident had happened to the drum, that
90 it had been deranged, in your natural course of business what would you do?

A. I would have to notify my foreman.

PLAINTIFF'S COUNSEL: Q. And who was that?

A. That was Christy Gerraghty; we acknowledge him as such always.

Q. You received your orders directly from him?

A. That night, yes, sir.

Q. And all your communications to a superior officer were to him?

A. That night, yes, sir.

Q. And that, I understand you, was the usual course of business?

A. Yes, sir.

Recross:

Q. Do you mean to say that you always applied to Mr. Gerraghty?

A. No, sir.

Q. You applied to others there?

A. To other foreman; he is superior and he is under sometimes; according to what we are doing.

Q. Didn't Mr. Craven set you to work that night?

A. I don't remember who set me to work, exactly.

Q. The only occasions you had anything to do with Mr. Gerraghty that night were the two that you spoke of when he came down on the scow, weren't they?

A. I had occasion to do whatever Christy Gerraghty told me to, which I always did whenever he was in our gang, as we call it.

Q. Did Mr. Gerraghty speak to you on any other occasion that night, except those two when he came down on the scow, as you have stated?

A. Well, he might, and might not; I disremember that; sometimes he would and sometimes he wouldn't; I don't remember.

91 Q. And you have stated all that you remember of the conversation that occurred between you and Gerraghty?

A. All, as far as I remember.

Q. When the men were to do any particular work on that dock, who would give orders that it should be done; Mr. Craven, would he not?

A. Mr. Craven, of course, would give the first orders, if he would get the first orders.

Redirect:

Q. What was Gerraghty's title; what was he called?

A. We used to call him Mr. Gerraghty, and Christy, sometimes.

Q. That was his name; but I mean what was he called; some sort of boss, wasn't he?

A. Second foreman; coal boss.

Q. What did that mean?

A. The man that used to superintend coaling the ships up.

Q. Taking charge of the coal gang and the operation of the machinery?

A. Yes, sir; and then when there was no coaling to do, he used to superintend on the dock, acting as an assistant foreman.

Q. In the absence of Mr. Storey and Mr. Craven, who had charge of that dock?

A. I don't know; Christy Gerraghty was the only foreman that was there that night, as far as I know.

DEFENDANT'S COUNSEL: Q. Do you mean to say that Mr. Gerraghty gave any directions with regard to the rigging of the fall that night?

A. I can't say.

Q. Not either one of the foreman?

A. I can't say.

PLAINTIFF'S COUNSEL: Q. When you notified Gerraghty of that defective rope did he tell you to go anywhere else?

A. No; I don't remember him telling me to go anywhere else.

92 Q. He took the rope himself and steeped it as you have stated?

A. Yes, sir.

DEFENDANT'S COUNSEL: Q. Did he take the rope off the drum?

A. The bight of it; that was all.

Q. Then dipped it in the water in front of the scow?

A. Yes, sir.

The plaintiff, further to maintain the issues on his behalf, called LAWRENCE BURDETT, who testified as follows:

I reside at North Hempstead, Long Island; I am about sixty-nine years old; my business is rigger, rigging—all kinds of rigging; I have been in that business some 51 or '2 years; I know a little something about it, sure. When I first commenced to have anything to do with rigging, or with ropes, I couldn't recollect the time rightly, but you may say I have been at it since a young man 14 years of age; now and again, here and in other countries: Philadelphia, Baltimore, Boston, Liverpool, and London.

Q. If a rope is chafed would dipping that rope in water have a tendency to strengthen or weaken it?

[A.] No, sir; that chafe is there; it don't do it any good—sure, that chafe is there; no use to doctor that, only to put a new one in its place. Splice it don't do it any good; if it has got to go through the block, it has got to go through the block; if it is dead strain it will stay there, but if it is working it won't.

Cross-examined:

Q. Will dipping the rope in water weaken it for use within two or three hours?

A. O, no.

Q. Have you ever followed the sea?

93 A. Well, I guess—sure; thank God, I know something about it.

Q. How long have you followed the sea?

A. Only about 16 years, for the firm of E. D. Hurlburt & Co., 8 South street, and Moses H. Grinnell.

Q. Then you know something about the working of ropes?

A. Yes, I do.

Q. Working a rope single through blocks will cause it to untwist, will it not?

A. Yes, sir.

Q. The turns will come out?

A. Yes, sir.

Q. And that is a very usual occurrence?

A. Yes. Allow me to speak one word. You see, the ropes in such weather as this—the sails is all set—well, when the blocks come together everything sags; you have to go around the fife rail, all around the vessel, and hook up those ropes, because those two blocks, being block and block, won't allow of that rope to go in, and the ropes sink, and they slacken all around the fife rail; that is sure.

Q. It is a very usual thing to use spliced ropes, is it not?

A. Yes, sir; yes.

Q. And a splice can be put in a rope as strong as the rope itself, can it?

A. It can be; but that is a bad place in it yet.

Q. The splice will be strong, will it not?

A. Yes, sir; stronger; the hand work is stronger than steam; but some men put a splice in a rope, but they don't stick their ends through long enough one way and the other for to hold it; they hardly put a knot in the splice; a long splice has three knots
94 in it; it is only a half of an overhanded knot, and if you stick that much through both ways it is a job to get it out; but if you only knot it, it will come out; that is sure; it will come out; if a short splice goes through a block it won't stay; it will work out.

Q. Is it a usual thing for spliced ropes to be used as stays in the rigging of a vessel, foresail stays and mainsail stays, and all that sort of thing?

A. But a stay is a steady piece of rope; it ain't a working piece of rope.

Q. There is considerable strain on a stay, isn't there?

[A.] A stay is stationary; there is no working on it.

Q. There is considerable strain on it?

A. O, well if the sail goes up we slacken; there is a strain there, but that is not a working strain; it is in its steady place.

Q. But there is a strain?

A. Of course; you can't tighten it unless there is a strain on it; tauten it, they say.

Q. How with regard to the sheets on a vessel, as to whether or not they are not also often spliced?

A. That is a working piece of rope; the sheet is.

Q. Is it not a usual thing for that to be spliced?

A. O, no; too short, too short; a sheet is too short, unless it is the gaff topsail on a fore-and-aft vessel, and that is a line.

Q. Did you ever know one to be spliced?

A. O, yes; I have known vessels to be spliced in the standing rigging, but it couldn't stay; comes to pieces; the strain of the water will shake it to pieces.

The plaintiff, further to maintain the issues on his behalf,
95 called JOHN W. HAWKINS, who testified as follows:

I reside at 675 Grand street, Brooklyn; I am a ropemaker, and have been so engaged close on 42 years.

Q. If a rope is chafed, would dipping that rope in water have a tendency to give it permanent strength?

A. Not permanent; for a while.

Q. What would be the after effects upon the rope?

A. Go the quicker.

Q. If a rope runs through pulleys would it chafe any more by being wet than it would by being dry?

A. No; the wetter it is the longer it will hold; if it is dry then it has a tendency to chafe; to chip; to cut quicker where the friction is.

Cross-examination—none.

The plaintiff here rested his case.

Defendant's counsel moves the court to direct a verdict for the defendant, on the grounds—first, contributory negligence of the plaintiff; second, that the evidence fails to establish negligence on the part of the defendant; and, third, that the injury was caused solely by the negligence of a fellow-servant of the plaintiff.

The court denied the motion to direct a verdict for the dfendant, and defendant's counsel excepts.

And thereupon defendant's counsel, to maintain the issues on its behalf, called PATRICK CRAVEN, who testified as follows:

My business is that of foreman stevedore at Cunard dock,
96 pier 40, North river, and it has been my business about 14 years.

Q. Have you been engaged on that dock 14 years?

A. 29 in the company's employ.

Q. What were your duties on that dock?

A. To take on men and put them to work and discharge the men when I got done with them.

Q. Did you hire men?

A. Yes, sir; I hired all the men.

Q. What were your duties with regard to the apparatus on the dock?

A. To see that everything was all right for the men. I remember the night that Patrick Carey was injured at the dock; I had set the men to work that night at six o'clock.

Q. What instructions had you given with regard to rigging any apparatus for the purpose?

A. I told my foreman rigger to get two purchases, and to put them up there; I was going to work two gangs in the hatch.

Q. Who was the foreman rigger?

A. Robert Graham.

Q. When did you tell him that?

Q. Working a rope single through blocks will cause it to untwist, will it not?

A. Yes, sir.

Q. The turns will come out?

A. Yes, sir.

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A. Yes, sir; stronger; the hand work is stronger than steam; but some men put a splice in a rope, but they don't stick their ends through long enough one way and the other for to hold it; they hardly put a knot in the splice; a long splice has three knots
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94 in it; it is only a half of an overhanded knot, and if you stick that much through both ways it is a job to get it out; but if you only knot it, it will come out; that is sure; it will come out; if a short splice goes through a block it won't stay; it will work out.

Q. Is it a usual thing for spliced ropes to be used as stays in the rigging of a vessel, foresail stays and mainsail stays, and all that sort of thing?

A. But a stay is a steady piece of rope; it ain't a working piece of rope.

Q. There is considerable strain on a stay, isn't there?

[A.] A stay is stationary; there is no working on it.

Q. There is considerable strain on it?

A. O, well if the sail goes up we slacken; there is a strain there, but that is not a working strain; it is in its steady place.

Q. But there is a strain?

A. Of course; you can't tighten it unless there is a strain on it; tauten it, they say.

Q. How with regard to the sheets on a vessel, as to whether or not they are not also often spliced?

A. That is a working piece of rope; the sheet is.

Q. Is it not a usual thing for that to be spliced?

A. O, no; too short, too short; a sheet is too short, unless it is the gaff topsail on a fore-and-aft vessel, and that is a line.

Q. Did you ever know one to be spliced?

A. O, yes; I have known vessels to be spliced in the standing rigging, but it couldn't stay; comes to pieces; the strain of the water will shake it to pieces.

The plaintiff, further to maintain the issues on his behalf,
95 called JOHN W. HAWKINS, who testified as follows:

I reside at 675 Grand street, Brooklyn; I am a ropemaker, and have been so engaged close on 42 years.

Q. If a rope is chafed, would dipping that rope in water have a tendency to give it permanent strength?

A. Not permanent; for a while.

Q. What would be the after effects upon the rope?

A. Go the quicker.

Q. If a rope runs through pulleys would it chafe any more by being wet than it would by being dry?

A. No; the wetter it is the longer it will hold; if it is dry then it has a tendency to chafe; to chip; to cut quicker where the friction is.

Cross-examination—none.

The plaintiff here rested his case.

Defendant's counsel moves the court to direct a verdict for the defendant, on the grounds—first, contributory negligence of the plaintiff; second, that the evidence fails to establish negligence on the part of the defendant; and, third, that the injury was caused solely by the negligence of a fellow-servant of the plaintiff.

The court denied the motion to direct a verdict for the dfendant, and defendant's counsel excepts.

And thereupon defendant's counsel, to maintain the issues on its behalf, called PATRICK CRAVEN, who testified as follows:

My business is that of foreman stevedore at Cunard dock,
96 pier 40, North river, and it has been my business about 14 years.

Q. Have you been engaged on that dock 14 years?

A. 29 in the company's employ.

Q. What were your duties on that dock?

A. To take on men and put them to work and discharge the men when I got done with them.

Q. Did you hire men?

A. Yes, sir; I hired all the men.

Q. What were your duties with regard to the apparatus on the dock?

A. To see that everything was all right for the men. I remember the night that Patrick Carey was injured at the dock; I had set the men to work that night at six o'clock.

Q. What instructions had you given with regard to rigging any apparatus for the purpose?

A. I told my foreman rigger to get two purchases, and to put them up there; I was going to work two gangs in the hatch.

Q. Who was the foreman rigger?

A. Robert Graham.

Q. When did you tell him that?

A. About 5 o'clock, when I was sending the other men away to supper.

Q. Are you sure that they went away to supper at 5 o'clock?

A. Yes, sir; positive.

Q. Did you see that he rigged the fall?

A. Yes, sir.

Q. Did you see the fall yourself, then?

A. Yes, sir.

Q. What was the condition of the fall?

A. The fall was good.

Q. Was there any defect in it which you could see?

A. None whatsoever.

Q. Will you state how the fall was rigged?

A. Yes, sir; the fall, supposing here was the ship's hold; it went right up perpendicular to a gaff through a block there, then
97 down to a davit in the ship's side through a block there, and from that to the scow, and then through the block in the scow at the engine, down to the drum.

Q. How long had it been customary to rigg falls in that way?

A. Always and ever when we want to keep them clear of the ship's side.

Q. Do you say it had always been customary to rig them that way?

A. Yes, sir; when we want to keep them clear of the ship's side.

Q. Do you know how long that fall was?

A. About 25 fathoms, as near as I can judge; we generally use them 25, 30, 40, and 45; this was a short fall.

Q. And you think this was 45?

A. No, sir; 25, as near as I can remember

Q. When they rigged the fall, did you see the splicing in it?

A. No, sir; not then. I didn't notice it then, it was down in the scow over the ship's side.

Q. At any time when that fall was rigged, did you see a splice in the rope?

A. I hadn't noticed it rigged before that time.

Q. Did you see the splice in that rope that evening or night while it was rigged there?

A. I saw it over the ship's side in the scow, when I was looking down on the scow after putting the men to work.

Q. How far was the splice from the block on the davit?

A. It broke about middle way between the block on the davit and the scow; it led right on the scow. It went right through the block into the scow.

98 Q. Were you there when the men commenced to work?

A. Yes, sir.

Q. Did you give instructions to each man as to what he should do?

A. I put 10 men down the hold to shoveling coal; I didn't give them instructions what to do; we generally put ten men in a gang and they generally pick out their jobs when they go down; then I placed two to the dump, and send two men to the scow.

Q. Do you remember who you sent to the scow?
A. Yes, sir.
Q. Who were they?
A. John O'Brien and John Hawkins.
Q. What were they to do?
A. Hoist coal, work the breaks.
Q. Was there any one else on the scow?
A. Redmond.
Q. What did he do?
A. He looked after the engine and boiler.
Q. During the time that you have been with the company you have seen them hoist coal, more or less?
A. Yes, sir.
Q. How often should you say?
A. Once a week; every week since I have been in the company when we hoisted coal; sometimes two ships a week—three ships a week.
Q. Can you say whether it has been customary or not to use falls that have been spliced?
A. Yes, sir; ever and always.
Q. Have you had any experience with regard to ropes?
A. O, yes; quite a lot.
Q. Can you say whether or not splicing a rope with a five foot splice weakens it?
A. No, sir.
Q. Does it or does it not?
A. No, sir.

PLAINTIFF'S COUNSEL: We don't claim that splicing a rope in good condition with a splice weakens it.

Q. Have you been stevedore for any other line?
A. No, sir.
Q. Before you were stevedore for this line what was your business?
A. I worked in Philadelphia then.
99 Q. How long did you remain on the dock that night?
A. Five minutes after nine when I went out of the gate.
Q. And during that time were you around the dock?
A. I was around the dock for about half an hour; I was sick and went up and laid down in my room, and could not lie there and came down and walked around on the dock.
Q. Did you walk around among the men on the dock?
A. Yes, sir.
Q. Did you see them at work there?
A. Yes, sir.
Q. Did you go on the vessel?
A. Yes, sir.
Q. Did you see the men at work down in the hold?
A. Yes, sir.
Q. Did you go on the scow?
A. No, sir.

Q. During the time that you were there was Christy Gerraghty around?

A. Yes, sir; I called Christy.

Q. What was he doing there?

A. He was down in the between decks looking after the men that were wheeling the coal.

Q. What was Christy Gerraghty's position?

A. To take charge of all the men and look after them and see that every man done his duty.

Q. He was under you, was he not?

A. Yes, sir.

Q. Would he have anything to do with the apparatus on the dock or on the barge, or on the vessel?

A. No, sir.

Q. Did he have any power to employ or discharge men?

A. No, sir; none whatever.

Q. Do you know how the men were stationed on the vessel that night?

A. Yes, sir.

Q. How?

A. There was ten men down the hold and one man each side tending to the coal fall.

Q. One man on each side of what?

100 A. Each side of the hatch tending to the coal fall and helping to dump the tubs.

Q. What was the object in having two men on each side of the hatch down the hold?

A. One man had to wheel and one man to dump.

Q. I mean two men on each side of the hatch?

A. Because the tub came down on each side of the hatch and had to have a man on each side; one man could not be running around across to the other side to unhook the tub.

Q. You have seen Carey on other occasions engaged in similar work, have you not?

A. Yes, sir.

Q. Down in the hold of a vessel shifting coal?

A. Yes, sir.

Q. Did you ever give instructions to him, or to other men when he was present, with regard to running under the hatch while engaged in hoisting?

A. Several times; an every-day occurrence.

Q. What instruction did you give him?

A. Not to be standing underneath the hatch with a draught coming up.

Q. Is it a common occurrence for men to run under the hatch?

A. It is.

Q. When they are hoisting?

A. Yes, sir.

Q. In your opinion, is it a dangerous position to be in?

Well, if there is any danger of anything falling down on top of

him; there may be a lump of coal in the tub and may be falling down on them.

Q. And you say you have cautioned the men not to be running under that hatch while engaged in that work?

A. Yes, sir.

Q. How often have you done so?

A. O, it is an every-day occurrence when we are discharging.

101 Q. Did you see that rope after the injury?

A. Yes, sir; next morning at 6 o'clock.

Q. Where was it?

A. Down in the store-room.

Q. Did you examine it?

A. Yes, sir.

Q. How carefully?

A. I examined it all over.

Q. For what reason?

A. On account of the man at the gate telling me there was a man got his leg broke on my going to the dock at the usual hour—6 o'clock.

Q. Did you examine the rope?

A. Yes, sir; examined it all through.

Q. What was the condition of the rope?

A. The turns all out of the rope where the splice was. The rest of the rope was all right.

Q. Was it worn or chafed?

A. It was a little bit chafed where the splice was; that is all.

Q. How much was it chafed?

A. Nothing to hurt it if the turns was in it.

Q. Do you know how long that fall had been used?

A. I suppose it had been used about four or five months, as near as I can recollect. I don't know how often it was used, but it had been on the dock that long.

Q. How long is it customary to use a coal fall?

A. Five and six months.

Q. In doing just this kind of work?

A. Yes, sir.

Q. Was this rope, or any portion of it, in such condition that it would break with the weight of five hundred pounds on it when you saw it that next morning?

A. No, sir; not one particle.

Q. You saw both the ends?

102 A. Yes, sir; both ends; I compared them the next morning.

Q. The strands were separated?

A. The strands were separated and all fagged out. When they came flying down out of the blocks the strands flew apart.

Q. And then there was no splice in the rope?

A. No, sir; there was no splice in the rope then.

Q. Who did you get your instructions from on the dock?

A. From the superintendent.

Q. Who was the superintendent at that time?

A. Mr. Storey.
Q. Is Mr. Storey now dead?
A. Yes, sir.
Q. Can you tell whether that splice drew?
A. The turns came out of the rope; that is the way it drew.
Q. Have you ever known, while working a fall, that the turns have come out?
A. Yes, sir.
Q. How often?
A. Very often. I couldn't say how often, but very often.
Q. What makes the turns come out?
[A.] Sometimes that tub goes swinging right around when working a single rope, and other times working two parts of a rope it may come out; working through the sheaves of the block it may come out.
Q. It was the duty of the man stationed at the hatch who tended the fall to steady those tubs, was it not?
A. Yes, sir.
Q. To prevent their revolving?
A. To prevent the tubs from swinging.
Q. And when the turns come out of the rope what is the effect on the rope?
A. It weakens it.
Q. And then what is done with the rope?
A. You take it off and take turns into it again.
103 Q. And when the turns are put back again, then what is the condition of the rope?
A. The rope is as good as ever.
Q. Have you known ropes to be used after you have seen the turns come out and known that they were put back again?
A. Yes, sir.
Q. And you say that is a common occurrence?
A. A common occurrence.
Q. After the turns have been put back in a rope do you know what the effect of dipping such a rope in water is?
A. It swells it and keeps the turns from coming out.
Q. Is part of your duty to buy any of the apparatus or machinery on the dock?
A. No, sir.
Q. Or part of your duty to keep it in order?
A. No, sir.
Q. Is it the duty of Mr. Gerraghty to do either of those things?
A. The storekeeper generally keeps them in order, and when I am around and see anything wrong about falls, or anything like that, of course I give instructions to have it put in.
Q. And who attends to that?
A. The foreman rigger, Robert Graham.
Q. Since this injury have you used on that dock a piece of the same coil?
A. Yes, sir.
Q. A piece of the same coil which had been used as a fall?

A. The same coil of rope has been used as a fall. We have got some of it on the dock.

Q. Have you recently made a test with such a piece of rope?

A. Yes, sir.

Q. What did you do?

A. I put 20 hundredweight onto it, over my head, and
104 hoisted onto it; I hoisted, and two men more. Then we let it come down with a surge and brought it up with a sudden jerk; then it came down on the dock.

Q. Have you got a piece of that rope?

A. Yes, sir; the storekeeper has it.

Cross-examined:

I am still the foreman upon that dock. Mr. Thos. Henretty is still employed on that day dock. Mr. Thomas Crotty is not; he is there once in a while, but not steady.

Q. Whenever you want him do you send for him?

A. No, sir; I get him outside the gate. John Foley is once in a while there. Edward Farley, Charlie Flynn, Tim Lane, Patrick O'Brien, Charlie Lawson, Joseph Donnelly are still employed on the dock. John Stafford would be there once in a while.

Q. Like some of the others, if you want him you can get him?

A. Yes, sir.

Q. What were your hours on the dock; what were they at the time of this accident?

A. That is a hard question to answer, because sometimes we would be there all night, the men working; but the regular hours are on the dock from 7 in the morning till six at night.

Q. What are your hours when the men are working?

A. The same.

Q. Is it your duty, then, to remain with your men when they are employed and working?

A. Yes, sir; when I feel well.

Q. Were you sick that night?

A. Yes, sir. I resided at that time in Jersey City; I went home about five minutes past nine.

Q. How do you fix that time?

A. I have got a watch in my pocket.

105 Q. Did you look at your watch?

A. Yes, sir. I remember what the last order I gave was before looking at my watch.

Q. After you left at nine o'clock, as you say, who was left in charge?

A. Christy Gerraghty, the coal foreman.

Q. Mr. Storey wasn't there?

A. No, sir.

Q. Where did Mr. Storey die?

A. In the hospital.

Q. Then, after nine o'clock, the person in charge of that dock and ship and of all the matters pertaining to loading and unloading was Christy Gerraghty?

A. Yes, sir.

Q. Who rigged that fall that night?
A. That I can't say.
Q. You don't know?
A. No, sir.
Q. Who did you order to have it rigged?
A. The foreman, Robert Graham.
Q. What are his duties?
A. His duty is to rig it all up, or see that it is put up; I give him a gang of sailor men, and he has all the gear put up. I know where he was when I went home; he was home; he went home at six o'clock.
Q. The only time I understand you say when you saw the splice was when you looked over the side of the vessel on the scow?
A. Yes, sir; then I saw it the next morning when it was drew.
Q. Before you went home that night, that was the only time that you saw the splice?
A. Yes, sir; that is the only time that I can say that I saw it.
Q. Then if you don't know who rigged that fall you certainly weren't present when it was rigged?
A. No, sir; I wasn't present when it was rigged.
Q. What rope did you see when you told Graham to rig the fall?
A. I didn't see any ropes at all then; they were all in the
106 store-room.
Q. Then after you told Graham to rig the fall, what did you do?
A. I went away to start some other men some place else. I saw Mr. Graham after that, at six o'clock, when he was knocking off; that is the time he knocked off and went home. I saw this fall about a quarter past five; it was rove then; we had it already for work; it was all rigged.
Q. Where did you stand when you saw it?
A. In the hatch.
Q. What hatch?
A. Right where the coal was going to be hoisted.
Q. And the only part of the rope which in the operation of the gear went into the scow that you saw was when you looked over the vessel's side?
A. I saw the whole of it; I had the fall in my hand—the part that went down in the hold. I did not have the spliced part in my hand. I gave the order to Graham to rig that fall about five o'clock, when I knocked the other men all off. I saw it rigged at quarter past five.
Q. Then you didn't see it from the time that you gave the order to Graham until you saw it rigged at six o'clock?
(No answer.)
Q. Did you give him orders to pick out any particular rope?
A. I told him to get a good short fall and leave it there.
Q. Were you present when he gave out the rope?
A. I wasn't down in the store-room at all; no, sir.
Q. Is Mr. Hawkins still in your employ?
A. No, sir.

Q. Is Mr. Redmond?
A. Mr. Redmond is; yes, sir.
Q. Do you know where Mr. Hawkins is?
A. No, sir.
Q. On this night, Mr. Storey being absent, you being absent, Graham having gone home at six o'clock, whose duty was it to look after that rope?
107
A. The man at the brake.
Q. That would be O'Brien?
A. Yes, sir.
Q. What would it be his duty to do?
A. It would be his duty if he saw anything going wrong with that fall to take it off and take the turns into it again.
Q. Suppose the rope was chafed and worn out?
A. Well, then he would have to get a new one in.
Q. Wasn't it his duty to tell Gerraghty?
A. Yes, sir.
Q. Where does the man who hooks the tubs onto the fall stand in order to hook tubs on and send them up and take the descending tubs?
A. Alongside the tubs.
Q. That is right by the hatch?
A. Yes, sir; right by the hatch; well, it depends were they hook the tub on.
Q. There is one tub going up and another coming down?
A. Yes, sir.
Q. Of course the one going up and the one coming down would be on opposite sides, wouldn't they?
A. Yes, sir.
Q. Then if the tub nearest the man is going up, in order to grasp the tub coming down it would be necessary for the man to step forward to get it?
A. He hasn't to do that.
Q. To catch that tub it would be necessary for him to step forward?
A. Yes, sir.
Q. And then draw it back to reach the shovelers?
A. Yes, sir.
Q. Suppose the tub got down to the floor or to the top of the coal, supposing the hold to be full of coal, he has then got to go under the hatch to get the tub?
A. No, sir; he can stand on one side of the hatch.
Q. If the tub comes down through the hatch, and the tub that had gone up was nearest to him, he has got to reach over, hasn't he?
108
A. He has got to reach over; yes.

By the COURT: Q. How many tubs were there at work that night?
PLAINTIFF'S COUNSEL: I think Carey has testified there were six.

Q. How do you base your statement that it is customary to use a rope five or six months?

A. You mean the coal falls?
Q. Yes.
A. As long as they are in good order.
Q. You say it is customary to use a rope five or six months?
A. Yes, sir; when they are in good order.
Q. A rope that is not in good order?
A. Then we will condemn it.
Q. When was it after the accident that you saw this rope?
A. The next morning, at six o'clock.
Q. Where?
A. Down in the store-room door.
Q. When did you next see it?
A. I didn't see it afterwards.
Q. Have you ever seen it since?
A. Not to my knowledge; I never looked after it.
Q. I understand you to testify that when a rope is dipped in water it swells it?
A. Yes, sir.
Q. Will you, under your oath, swear that dipping a rope in water gives a rope permanent strength?
A. Not to continue so; it will for a day.
Q. For a length of time?
A. For a length of time it will.
Q. After the water is soaked out, or after the effects of the water upon the rope have passed away, what is the condition of the rope, stronger or weaker?
A. I don't say it would be any stronger or any weaker.
109 Q. Then you don't want to say one way or the other which it will be?
A. No, sir.
Q. How did that rope look when you saw it in the morning?
A. The rope looked all good enough.
Q. How about this part?
A. The end was all fagged where the splice drew.
Q. How was it; were all the fibres and strands parted?
A. The strands were all shook apart.
Q. Was it anything like that that I now show you?
A. No, sir.
Q. It wasn't like that?
A. No, sir; nothing like that.
Q. Look at it.
A. Yes, sir; I looked at it; no, sir; it was nothing at all like that. The rope was in far better condition than that was.
Q. How about the ends?
A. The ends were fagged out where it came right through the blocks.
Q. I suppose you have seen a spliced rope, have you?
A. Yes, sir.
Q. Is that a spliced rope?
A. Yes, sir; partly spliced.
Q. If that is not spliced the strands come out?

A. Yes, sir; but it opens the yarns out.
Q. Suppose you untie that and see whether it was like that.
A. This is a different thing altogether. The strands all come apart like that (opening the strands and yarns).

Redirect:

Q. Gerraghty had nothing to do that night after you left but to attend to these men taking out the coal?
A. No, sir.
Q. Is it necessary for a man who is down in the hold and whose duty it is to unhook and hook on the tubs at any time to
110 step out in the hatch under a loaded tub for any purpose?
A. No, sir.
Q. The tubs can be reached from each side of the hatch, can they not?
A. Yes, sir.
Q. And on this occasion you say there were two men, one to attend to each tub?
A. Yes, sir.
Q. And even if there was only one man there, would it be necessary for him to step out under the loaded tub in order to get to the other tub?
A. No, sir; he would have to go across the hatch.
Q. Couldn't he go around?
A. He might go around; depend on where they were shifting coal. If there was a bulkhead in the hold he couldn't do it.
Q. On that occasion each man had his own tub to attend to?
A. Yes, sir.
Q. A tub on each side of the hatch?
A. Yes, sir.
Q. Do I understand you to say that all rope of the kind that this was generally lasts in such use five or six months?
A. Yes, sir.
Q. Would you recognize the kind of rope that it was if it were shown you?
A. Yes, sir.
Q. I ask you if that is the kind of rope that it was (showing a piece of rope to witness)?
A. Yes, sir; the same class of rope.
Q. And the same size?
A. Yes, sir; the same size; three and a half inch; three strands.
Q. Do you know whether or not this splice ran through the block on the davit?
111 A. No, sir; it didn't go through the block on the davit.
PLAINTIFF'S COUNSEL: Q. Where is the block on the davit?
A. The davit is the big iron that holds the ship's boats up.
Q. You have seen the ends of rope of this kind after they have been broken?
A. Yes, sir.
Q. Did such ends look anything like the ends of this rope which you saw next morning?

A. Yes, sir.

Q. Were the strands separate from each other?

A. O, no; the strands would be quite close, as though cut off with a knife, when the rope parted.

Q. That is, when the rope was broken?

A. Yes, sir; when broken.

Q. Was that the condition of this rope?

A. No; any one who saw this rope would know the splice was in it.

Q. And that splice had drawn?

A. And the splice had drawn.

Recross:

Q. Did you see the rope spliced?

A. No, sir; I didn't see it spliced.

Q. Then you don't know whether it was properly spliced?

A. Yes; I know that the man that spliced the rope would properly splice it; I know that much.

Q. You know that he would properly splice it if he did his duty?

A. Well, I know he always did his duty.

The COURT: You testified that you hire and discharge the men in this coal work?

A. Yes, sir.

Q. And that your duty is to see that everything is right in regard to the machinery and appliances on the dock?

A. Yes, sir.

112 Q. That is so, is it?

A. Well, as far as machinery is concerned, there is a man there that looks after that; I don't mind about the machinery, but I see that the falls and everything connected with them is all right.

Q. Not including engines and machinery?

A. No, sir; not that.

Q. In your absence has anybody the right to hire or discharge men, and are the duties of anybody to see that the falls, &c., are right on the dock in your absence?

A. Yes, sir; but I don't be absent. I have never been absent but once or twice, and then the superintendent generally attends to them.

Q. In your absence who takes your place in discharging men if it is necessary, seeing to the condition of the falls and things on the dock?

A. Christy Gerraghty would take the discharging and hiring of men if I was to be absent, and Robert Graham would take charge of the falls.

Q. Suppose you were both absent?

A. I couldn't tell who it would be then.

PLAINTIFF'S COUNSEL: I understand that in the absence of Graham and Craven, Gerraghty would have full charge?

The WITNESS: Yes, sir; Christ Gerraghty would have charge then.

Q. Both of the men and of the gear?
(No answer.)
DEFENDANT'S COUNSEL: Q. Did Christy Gerraghty have any power to hire and discharge men independently of you?
A. No, sir.
Q. No matter whether you were there or not?
A. Well, if I wasn't there he would have the power.
Q. Do you know of any time when you have not been there on such an occasion?
A. Yes, sir; I have been once away.
113 Q. When was that?
A. About a year ago; I hurt my knee; I was away for ten days sick.
Q. Is that the only time?
A. That is the only time.

The defendant, further to maintain the issues on its behalf, called PHILIP B. LOW, who testified as follows:

I am in the cordage business; that has been my business since last January; prior to that my business was the rigging business—ship-rigging. I was in that business about seventeen or eighteen years; prior to that time I followed the sea altogether for about twelve years.
Q. In following the sea in what capacity did you act?
A. All the way from a boy up to mate of a ship. I am acquainted with Manilla rope, sir.
Q. Will you look at this and state what it is (showing piece of rope to witness)?
A. That is Manilla rope. I should judge three and three-quarter to four inch. I am connected now with William Wall's Sons; their business is manufacture of cordage; they are large manufacturers; I think one of the largest in the country.
Q. Is a rope of that class an article that is manufactured by William Wall's Sons?
A. Yes, sir; I am acquainted with this rope in regard to its strength.
Q. Can you state what a rope of that kind when new will bear; what strain?
A. I can; but should have to refer to a list and do a little figuring.

PLAINTIFF'S COUNSEL: I don't think we will dispute a rope
114 of that class will bear a great deal of strain. What weight do you want to prove?
DEFENDANT'S COUNSEL: About seven tons.
PLAINTIFF'S COUNSEL: I don't know but we will admit that it will bear that strain.

A. It will bear a working load of five tons with safety; it wouldn't part under that strain.
Q. What would you say, if a rope of that class had been used as a fall for five or six months, as to the effect of dipping it in the

water during the time it was being worked once; what would be the effect upon its condition for two hours of subsequent work?

Q. Assuming that a rope of that class had been used for about five months for hoisting a weight not exceeding five hundred pounds, and was chafed, more or less?

A. It would have two effects upon a rope; one would be to harden it in the strand, and at the same time become slightly swollen; that in itself would produce the hardness in the strand.

Q. Would it rot the rope for two hours' subsequent work?

A. O, no, sir; no, sir.

Q. Now, assuming that the turns had come out of such a rope, and that they are put back again and the rope then dipped in water, what effect, if any, will such dipping have upon the rope for two hours' subsequent work?

A. It would have the tendency to hold it in the position it was in at the time it was dipped in the water; the tendency would rather incline that way. I am acquainted with splices in ropes, and the effect they have upon a rope.

Q. Now, assuming that a rope in good condition is spliced
115 with a splice five feet long and the turns remained in the rope, what effect would such a splice have upon the carrying power of the rope for three or four hours' work?

A. That is a somewhat vague question. There are several conditions which would alter my answer in a question of that kind. In the ordinary ropes used for whips I should never hesitate to make a splice, provided you keep the turns in; splicing don't improve a rope, if it did we should make them spliced. Ropes are spliced more particularly where they run in a single part than where they go through three or four sheaves or blocks. You keep the turns in a rope (and I have used them a great deal in my line of business before going into the cordage business), and I never hesitated to make a splice in any single rope where it passes through a sheave.

PLAINTIFF'S COUNSEL: The last part of the answer I don't understand.

The WITNESS: I will correct that and say, where it is not necessary to pass through the sheave.

PLAINTIFF'S COUNSEL: Through a block?

The WITNESS: Through a sheave—block you may term it, probably.

Cross-examination:

None.

116 The defendant, further to maintain the issues on its behalf, called LEWIS F. PECK, who testified as follows:

My business is shipchandler and engineers' supplies; in the spring of 1880, my business was the same, shipchandler, in connection with the firm of John F. Baxter. In the spring of 1880 we sold to the Cunard Steamship Company a coil of three and three-quarter inch Manilla rope.

Q. Will you look at the rope shown you, and tell me if that is

the same class of goods you sold? (Showing witness same piece of rope as shown to the other witnesses.)

A. It looks to me the same class of goods.

Q. From whom did you procure the rope?

A. William Wall's Sons.

Cross-examined:

I recollect the sale; I have an invoice of it; not with me.

Q. Can you recollect what is in that invoice?

A. A coil of three and three-quarter Manilla, I think, according to my memory.

Q. Pardon me if I remind you that you are under oath. Do you swear positively that you now remember what is in that invoice?

A. If you will allow me to go by a memorandum that I have, I think I can.

Q. No, wait a moment; without referring to any memorandum, can you remember?

A. No, sir; it would be impossible to remember where we sell so many tons of rope as we do.

Redirect:

Q. Have you looked up the memorandum of your sales?

117 A. Yes, sir; I have.

Q. And you find such a memorandum?

A. I find such a memorandum.

PLAINTIFF'S COUNSEL: Q. I understand you say that you have not the invoice with you?

A. I have not the invoice with me.

The defendant, further to maintain the issues on its behalf, called DAVID SMITH, who testified as follows:

Q. What is your business?

A. Storekeeper.

Q. Where?

A. At the Cunard dock, pier 40, North river. I have been a storekeeper for the Cunard Company twelve years; before that I was five years on the dock, and before that I was twenty-five years at sea.

Q. What is your position when at sea?

A. All sorts; mostly sailor.

Q. What is your duty?

A. To protect and take care of the company's property, all the gear, such as splicing ropes, overhauling the gear and trimming lamps; getting the gear out, if it is wanted.

Q. Looking after the ropes and chains?

A. Ropes, chains, and everything.

Q. Blocks?

A. Everything that is on the dock used for loading and unloading the ships.

Q. You keep in this store-room all this apparatus that is used?

118 A. Not in one place; but I have two, one on each side of the passage.

Q. And such apparatus is under your charge?

A. All under my charge.

Q. What experience have you had in the handling of ropes?

A. The experience I have, I know pretty well what a rope can bear.

Q. Do you understand how to splice ropes?

A. I should partly fancy so, but I leave that over to people that understand the business to see if there is any fault to be found with my work. I know when a rope is worn or chafed.

Q. When an apparatus is needed for use on the dock, so the men come to you for it?

A. Yes, sir.

Q. And after they are through with it, do they bring it back to you?

A. Yes, sir.

Q. And then what do you do with it?

A. I go through to see if there is anything the matter with it. If it wants splicing afresh, or anything like that, I do it as long as the rope is good, and if not I condemn it and put it in the junk locker.

Q. Do you examine it all over?

A. Yes.

Q. Do you remember, in the spring of 1880, receiving a coil of new Manilla rope three and a half or three and three-quarters inch?

A. Yes, sir; three and a half.

Q. Will you look at the rope at your feet and see if it is the same class of rope as that (showing piece of rope before referred to)?

A. Yes, sir.

Q. And for how long a time had you been in the habit of receiving such rope?

119 A. Since I have been in the store-room—twelve years.

Q. What did you do with the coil then?

A. I cut it up in falls for use in hoisting coal with.

Q. Can you tell the exact time that you received this?

A. Yes, sir.

Q. When was it?

A. On the 13th of April.

Q. Do you know what the length of the falls was that you cut it up into?

A. Yes, sir.

Q. How many lengths did you make?

A. I made three.

Q. Do you cut it up into falls for any particular kind of work?

A. I always cut the longest one of all that is used that way that I could, and make the shorter ones out of the rest.

Q. What kind of falls did you cut these into?

A. Two 44 each, and the last one 45.

Q. 44 and 45 what?

A. Fathoms.

Q. Do you know how long they were used that length?

A. They were used for some between three or four months.

Q. And then what did you do?

A. I took the bad places out and I spliced the good ends together to make a shorter one.

Q. When you spliced the two ends together to make a shorter one how long was that one?

A. 25 fathoms.

Q. And what was the condition of that rope for use as a fall when you spliced them together?

A. It was in a condition that I would leave my life to it.

Q. How many times was it used after it was so spliced?

A. To the best of my knowledge, twice.

Q. And how long before this injury occurred?

A. About a week.

120 Q. After it had been so used was it brought back to your store-room?

A. Yes, sir.

Q. Did you examine it?

A. I examined it; yes, sir.

Q. Carefully?

A. Carefully.

Q. What was its condition then?

A. It was good; it could go out again to work.

Q. Do you remember the occasion of that night that Mr. Carey was injured?

A. Yes, sir.

Q. Do you remember the fall leaving the store-room that afternoon?

A. Yes, sir.

Q. Who came and got the rope?

A. Robert Graham.

Q. Will you explain to the jury what splicing is?

A. I opened three feet on each end; that is, according to the strands of rope; if there is a four-stranded rope I take six feet; if there is a three-stranded rope, as this is, I take three feet on each end and open them out and put them together; I put them together like that in the middle, and work one end that way and leave the two middle parts here—two strands—and then work the other end down that way, and splice those that way, the same as in that rope there.

Q. That is a spliced rope that you have in your hand? (Referring to same piece of rope as before.)

A. Yes, sir; that is. If there is any fault to be found I give that over to somebody who understands it.

Q. How long a splice was it?

A. The proper length is five feet, because I open them out three feet on each end; that should make six feet, but leaving an end on each to splice it of course that makes six or seven inches shorter.

121 Q. What kind of a splice was it that you put in this?

A. A long splice like you see there.

Q. A five-foot splice?
A. Yes, sir.
Q. Is it possible for such a splice as that to draw unless the turns come out of the rope?
A. No, sir.

By the COURT:

[Q.] What do you mean by the turns?
A. Twists them out like that, where all the twists come out.
Q. In working the rope it is a usual thing for turns to come out, isn't it?
A. Yes, sir.
Q. And then they have to be put back again?
A. Yes; the turns has to be put in again.
Q. Whether the rope is spliced or not, if the turns come out they must be put in again before you go on working?
A. Yes, sir; they must be put in again.
Q. Did you see this rope after the injury?
A. Yes, sir.
Q. Did you examine it?
A. I examined it.
Q. Carefully?
A. Yes, sir.
Q. What was the condition of the rope then?
A. Well, the splice was out.
Q. The splice was drawn?
A. Yes, sir.
Q. Was the rope broken?
A. No, sir.
Q. Was it all there?
A. All there.
Q. How could you tell whether the splice had drawn or whether the rope had broken?
A. I could see it according to the ends that were left.
A. And did you see those ends on this occasion?
A. I saw them; I had them in my hand.
Q. How long after the injury was it that you examined the rope?
122 A. In the morning; 7 o'clock.
Q. Will you describe to the jury the difference between a rope that is broken and one where the splice is drawn?
A. Yes, sir; supposing the rope carries away, it gets worn before there is one strand broke, and that will be awhile—we will say ten for minutes—before the other parts would go—the other two strands; then, of course, there might be a little difference in the strands; in the length of them; but when the splice is drawn you can see the whole full length of the strand, as it has been made up.
Q. And on this occasion you did see the full length of the strand?
A. I saw the full length.
Q. What, in your judgment, was the cause of that splice drawing?
A. Because the twists came out of it; the turns.

Q. And had you been in the habit of using spliced falls before?
A. Yes, sir.
Q. And for how long a time?
A. I have seen it since ever I went to sea.
Q. I mean since you have been with the Cunard Company?
A. I saw it every week or every fortnight that a rope carried away and was spliced.
Q. I mean to say whether it is a customary thing for the Cunard Company to have spliced falls?
A. Yes, sir.
Q. And for how long a time have they had spliced falls?
A. As long as I am on the dock.
Q. In your judgment a spliced fall is as good as any, if it is watched?
A. Yes, sir; exactly.

123 Cross-examined:

Q. Every time the fall carries away they splice it?
A. If it is good enough.
Q. If it is good enough to splice?
A. Yes, sir.
Q. But if the rope is a poor one they won't splice it?
A. They won't splice it; no.
Q. Can you remember when it was that you spliced this particular rope?
A. I could not say the day.
Q. Is your memory good?
A. Very good, sir; yes, thank God.
Q. Do you remember the time when you got this coil of rope?
A. Yes, sir.
Q. What day was that?
A. The 13th day of April, 1880.
Q. How can you recollect that and cannot recollect the other?
A. Because I keep a log. Recollect what?
Q. How is it that you recollect that so distinctly and can't recollect the time when you spliced that rope?
A. Because I don't keep a log when I splice a rope, but I keep a log when I receive things.
Q. What is a log?
A. It is a book.
Q. Is that book here?
A. It is here, to the best of my knowledge.
Q. Then all you remember about it is in that book; that is all you remember as to the time when you received it?
A. How could I remember the dates if I didn't have it in black and white on the book?
Q. You only remember it from seeing the fact in the book?
A. Only through the book.
Q. How do you recollect now that the coil that you find is on that book is like the coil that is lying at your feet?

124 A. Well, that is the order that was given out at that time, and that is the order what was given for this rope—three and a half.

Q. Then the only way that you fix it is that on this book it says that a coil was received like this coil here?

A. No, I don't say so at all; I mean to say that the coil that was ordered at that time was three and a half inch.

Q. That is all you mean to say; that a coil ordered at that time was three and a half inch?

A. Yes, sir.

Q. And then you looked at this coil that is here and saw that it is three and a half?

A. Because we don't use no other for that purpose.

Q. Then the only way you fix it is that that was a three and a half and this is three and a half?

A. Well, I do measure the rope in general myself when I receive it.

Q. Do you recollect measuring this rope?

A. What; the one that carried away?

Q. The rope that you say came to you on the 3rd of April.

A. The 13th of April; excuse me, sir.

Q. Do you recollect measuring the rope on that day?

A. Well, I won't positively swear, but I think I did.

Q. But you won't swear to it?

A. Because I generally do it every time I receive a coil.

Q. Why do you do it?

A. For my own interest; to see whether they send the right rope or not — what is ordered; I have seen the time that we sent down for three and a half and we got three and a quarter, and I sent it back again; I wouldn't receive it.

Q. Do you recollect whether this was sent back?

125 A. No, sir; I kept it.

Q. Do you recollect how long that splice was?

A. Yes, sir.

Q. How long was it?

A. Five feet; that is, leaving the end for the splicing to take it over the same as on these; you see that (indicating two tips, one on each end of the splice).

Q. The splice was about five feet?

A. The splice from one end to the other was about five feet.

Q. Is that a long splice or a short one?

A. Yes, sir; that is what we call a long splice.

Q. If a rope is worn out—fagged out—chafed down, will splicing in that place make it stronger?

A. Well, I don't think any man with a common sense would splice a rope that is shagged out; he takes the best part of the rope that he can get hold of to splice it.

Q. Look at that rope and see if it is a spliced rope (showing witness a rope about a half-inch in diameter with the strands untwisted)?

A. Well, that is the form of a splice. I see the splice is formed

so far, but I don't think that is a proper long splice, to the best of my idea.

Q. If you get a sufficient strain on the rope so that you can carry away the splice, then it looks like that, does it?

A. If it is fagged out it will. Of course if a splice goes through a block forward and back it will cut the end a little where it sticks over.

Q. Now, a splice going through a block, the friction will wear down the part you referred to so that it will level with the rest of the rope, won't it?

A. That is, according to what kind of use it is. Some ropes
126 will come untwisted, more or less; experience has to speak for that, whether you can tell about that.

Q. Do you recollect what time it was you gave this rope to Mr. Graham that night?

A. To the best of my opinion, about five o'clock.

Q. Do you give anybody else ropes but Mr. Graham?

A. No, sir; I didn't that evening.

Q. Did you see that fall rigged that night?

A. No, sir; I have nothing to do with rigging her.

Q. You don't know, then, who rigged it?

A. O, I can rig it up, but I don't know who rigged it that night.

Q. After the rope passed from you to Mr. Graham you didn't see any more of it that night, did you?

A. No, sir.

Q. How do you know, then, that the rope which you looked at the following morning was the same rope?

A. Well, that I couldn't swear that it was the same rope that they took or not.

Q. Then you can't swear that the rope that you saw in the morning was the same rope?

A. I know that the rope that I gave out that night had a splice in it, and the rope that was lying there in the morning had a splice drawn.

Q. What time did you go home that night?

A. About half past seven.

Q. Did you give out any other ropes that day?

A. Yes, sir; some time shortly after dinner.

Q. That day, do you recollect?

A. Yes, sir; I give out some ropes in the daytime.

Q. I suppose it is a very common thing for you to be giv-
127 ing out ropes?

A. Yes, sir.

Q. Mr. Graham came to you after that rope?

A. Yes, sir; he came.

Q. What did he say to you?

A. He wanted a short fall.

Q. Did you give him one?

A. I did not.

Q. You did not give him a short fall?

A. He took it himself; I didn't give it to him.

Q. He took a short fall?
A. Yes, sir.
Q. Did he take this fall?
A. Yes, sir; he took that fall; I stood and looked at him, but did not give it to him.
Q. This fall that you say you spliced?
[A.] Yes, sir.
Q. But you did not give it to him?
A. No, sir.
Q. Why not?
A. Why not? Because the rope that they sent for I didn't have just the length of it; I had other rope, but longer, and, of course, it was too long for that purpose.
Q. You are the storekeeper?
A. Yes, sir.
Q. Mr. Graham came to you, I understand you, and said he wanted a short fall?
A. Yes, sir.
Q. You didn't give it to him?
A. No, sir; I did not.
Q. Had he any right to do that?
A. Whether he had the right or not I can't say, but he took it.
Q. Why did you allow him to take it; wasn't it your duty to control that store-house there, and had he any right to come in there without your consent?
A. Yes, sir; many of them came and taken them.
Q. Had Mr. Graham any right to come and take that without your consent?
A. I didn't know at the time.
Q. You didn't know whether he had or not?
A. I didn't know at the time whether he had or not.
128 Q. Then it was your opinion that you did not give him that rope that night?
A. Yes, sir.
Q. This rope, I understand you, came into the store-house of April, 1880?
A. Yes, sir.
Q. Can you recollect how often that rope was used from that time down to the time of the accident?
A. How often I won't exactly particularize.
Q. But a good many times?
A. A good many times; but not a good many times after the splice was into it, you must recollect.
Q. How often had that rope been spliced in that time?
A. Only once; to the best of my knowledge, once.
Q. Do I understand you to say that the reason why you spliced it was because it was worn away?
A. It was worn, of course.
Q. How many feet was it worn away?
A. I cut out ten fathom—twenty fathom, I may say; the rope was 44 fathom, and I made 25 out of it.

A. You cut a hundred feet out of this rope?
A. Yes, sir.
Q. How long was the fall?
A. The fall was twenty-five fathom when the accident happened.
Q. Before you took out this piece, how long was it?
A. Forty-four fathom.
Q. And you took out how many fathom?
A. Somewheres from nineteen to twenty fathom out.
Q. When did you do that?
A. I couldn't say.
Q. And didn't Mr. Graham that night hand that rope back to you and tell you it wasn't fit to be used?
A. No, sir.
Q. He did not?
A. No, sir.

129 Redirect:

Q. You know that you received this coil in April, 1880?
A. Yes, sir.
Q. And you made a memorandum in your log-book?
A. Yes, sir.
Q. And you have referred to your log-book recently to ascertain that date?

PLAINTIFF'S COUNSEL: We are willing to admit for the purposes for this case that they got that rope April 13th.

Q. You put this splice in the rope, you say, about how long before the injury?
A. I couldn't remember that so well, because I didn't put it down on the book; but it was used twice, to the best of my knowledge, since the splice was in.
Q. And not oftener than that?
A. No, sir.
Q. Why was it that you cut out so much of the rope?
A. Because it was kind of chafed going through so many blocks; because the way we use falls; the time those were made we used so many blocks across the scow and the ship, and the rope had to go all the way through sheaves, and we had five or six different sheaves, and the rope got chafed.
Q. And you cut all that was chafed?
A. Yes, sir.
Q. And left the balance good, I understand you?
A. Good, yes, sir.
Q. Had you more than one fall that was used that night?
A. There was two in use.
Q. Were they both brought back to you?
A. Yes, sir.
Q. And you saw them both?
A. I saw them both; one was carried away, and the other one was right.

Q. The one that was carried away was the one that you
130 have spoken of as the one that had been spliced?
A. Yes, sir.

The defendant, further to maintain the issues on its behalf, recalled DAVID SMITH, who testified as follows:

Q. You said yesterday that you received this coil of rope about the 13th of April, 1880?
A. Yes, sir.
Q. And then cut it up into falls?
A. Yes, sir.
Q. Do you know when those falls were first used?
A. About a fortnight after I got them.
Q. You had other falls there at that time?
A. Yes, sir.
Q. Were you present when Mr. Craven tested a piece of rope, as he said yesterday?
A. Yes, sir.
Q. Did you see him test it?
A. Yes, sir.
Q. Is this the rope which he tested? (Referring to another piece of rope.)
A. Yes, sir.
Q. Is that a piece of the same coil which was brought and which you received in April, 1880?
A. Yes, sir; that is a piece of the rope of the same coil.
Q. And that has been in use ever since?
A. That has been in use ever since; that is for another purpose.
Q. What do the ends of this rope represent?
A. A long splice.
Q. A long splice after it has come out?
A. After the splice broke.

Rope last referred to offered in evidence for the purpose of inspection of the jury.

Q. And is that the way in which the ends of this fall in question looked the next morning?
A. Yes.

131 PLAINTIFF'S COUNSEL: We object to the introduction of this rope.

THE COURT: There is no harm done in having that come in. The jury will understand that it is not the fall which was in use.

DEFENDANT'S COUNSEL: We do not claim that.

Q. When the fall is in use it is not all subjected to the same amount of chafing, is it, in all its parts?
A. No, sir.
Q. Some portions become more worn than others?
A. Yes, sir; the outside yarns of a strand get worn where the inside yarns or the heart, as we call it, is good.

Q. And further than that the portions which pass through the block are more worn than those that do not?
A. Yes, sir.

Cross-examination:
None.

132 The defendant, further to maintain the issues on its behalf, called CHRISTOPHER GERRAGHTY, who testified as follows:

Q. How old are you?
A. 47.
Q. What is your business?
A. Coal boss.
Q. Where?
A. On Cunard dock.
Q. How long has that been your business?
A. About 7 years.
Q. Before that what was your business?
A. Before that I took charge of a gang of men working the cargo in a ship's hold.
Q. For how long a time?
A. About three or four years; I couldn't say which.
Q. And before that what was your business?
A. Longshoreman.
Q. How long were you longshoreman?
A. About six or seven years.
Q. As boss of the coal gang, what were your duties on the Cunard dock in November, 1880?
A. To look after the men and get coal removed from one hold into the other.
Q. Did you have anything to do with the apparatus that was used in such work?
A. No, sir.
Q. Did you have anything to do with buying it?
A. No, sir.
Q. Or keeping it in order?
A. No, sir. I remember the occasion of this injury to Patrick Carey; I was there when he was injured; I was in the ship's hold down where the men were working with him; I just went down to get the coal all swept up and cleaned up, and I stepped over to the wing on the inshore side and commenced to pick some coal out of some of the ribs with the men that were working it.
Q. You helped to clean up the coal there?
133 A. I just gave them a hand when I went down.
Q. How long had you been in the hold before he was injured?
A. Not more than half an hour; I had been up and down the hold several times through the night. I did not see the tub fall on him. I saw him lying there after the tub had fallen.
Q. Did you help pick him up?
A. I was afraid to look at it, and I heard the men say that were

around him that the man's leg was broken; and I went on deck to get a skid to have him hoisted out of the hold.

Q. Did you see the rope?

A. No, sir.

Q. Was there any dust in the hold at that time?

A. I didn't notice any more at that time than there was during the night.

Q. During the night was there any dust during the working?

A. A little; not very much.

Q. Was it light down in the hold?

A. Yes, sir.

Q. How light?

A. I couldn't say whether it was six or eight lamps down there lighted; I think there was three a side.

Q. Had you given any directions before this apparatus was rigged about rigging?

A. No, sir.

Q. Were you present when it was rigged?

A. No, sir; not at the rigging of it I wasn't.

Q. Did you see it after it was rigged?

A. Nothing more than to see the falls going up and down with the tubs; that was all.

Q. Was that what is known as a single fall?

A. Yes, sir.

Q. In working a single fall is it a usual thing for the turns to come out of the rope?

A. Yes, sir.

Q. And what is necessary to be done then?

134 A. The only thing ever seen done was to put the turns in the fall again all you can.

Q. In your experience as a longshoreman, as having charge of gangs of men, and as a coal boss, has it been customary in using single falls to use falls that were spliced with long splices?

A. Yes, sir.

Q. Did you see the splice in this rope?

A. No, sir.

Q. Have you had charge of the men on other occasions when Carey had been working with them?

A. Yes, sir.

Q. Do you know how long he had been working there at the time of this injury?

A. Something about two years; might be more or less.

Q. Had you ever given instructions to men while engaged in working in the hold with regard to the hatchway?

A. Yes, sir.

Q. What instructions had you given them?

A. I have often told them to keep clear of that hatch, and look out for them tubs.

Q. You say you have often told them that?

A. Several times.

Q. During that night did you go on the hoisting scow?

A. I did.
Q. Do you know what time you went there?
A. It was somewhere about half past nine o'clock; it might be a little more or a little less; I couldn't say; it was somewhere about that time.
Q. Who did you see there when you went?
A. I seen John O'Brien and Redmond and John Higgins, the man that was running the other drum.
Q. Did O'Brien speak to you?
A. Yes, sir.
Q. What did he say?
A. He told me to look at that fall.
135 Q. Was the fall or a portion of it to which he referred then inside of the house that was over the scow?
A. No, sir; I don't think it was; it was not.
Q. The scow is housed over, isn't it?
A. Yes, sir.
Q. All except about three feet in front?
A. About three feet in front.
Q. What did O'Brien say with regard to the portion of the rope he showed you?
A. I disremember what he said with regard to it; he told me it didn't look very well; I think we hauled the fall in.
Q. You saw the rope yourself?
A. Yes, sir.
Q. What was the matter with it?
A. The turns were out.
Q. Was there anything else the matter with it?
A. Not that I noticed.
Q. You have been accustomed to see and handle ropes?
A. Yes, sir.
Q. You can tell whether there is anything the matter with the rope, can't you?
A. Yes, I can tell if a rope is too bad.
Q. What did you do then?
A. I took the fall off of the drum and I put turns into it, and I threw the part that I put the turns into into the water.
Q. For what?
A. For to harden the rope and to swell it. I took the fall to the drum again with the assistance of Mr. O'Brien, and as I was going out of the scow I told him to look out for that fall, and if the turns would come out of that fall again for to take it off and put them in.
Q. You are positive of the fact that you told him that?
A. Yes, sir.
136 Q. Did you tell O'Brien at any time that night: "Never mind; go on with that fall; there are only a few tubs more"?
A. I did not; not that I remember. I don't remember any time saying that.
Q. Did you speak to O'Brien any other time that night?
A. I am not certain whether I spoke to him or the other man on

the other side about going to the mark—about going too high or not going high enough, or something like that. I think I had spoken to one or the other of them, but I don't know which.

PLAINTIFF'S COUNSEL: Q. One or the other of which two men?
A. Of the men on the drums.

DEFENDANT'S COUNSEL: Q. Was your attention called to that rope by O'Brien on any other occasion but the once that you have testified to?
A. I don't know as I understand you.
Q. Did O'Brien speak to you about the rope twice?
A. Not that I know of.
Q. You say that you were down in the hold about half an hour before the injury occurred. How many tubs were hoisted during that time, to the best of your recollection or judgment?
A. It might be about ten or twelve; it wasn't a great many, I know, because they were scraping up the coal and gathering it up. Ten or twelve tubs were hoisted during the time; I couldn't say; it might be more or less than that.

PLAINTIFF'S COUNSEL: Q. Ten or twelve tubs had been hoisted before the accident?
A. During the time I was in the hold.

DEFENDANT'S COUNSEL: Q. After you left the scow, as you have said, when O'Brien called your attention to the rope,
137 where did you go then?
A. I went down in the ship's hold again, either in the steerage deck, where they were wheeling the coal, or down below; I couldn't say which.
Q. And from that time were you on the vessel all the time?
A. Yes, sir; I was on the vessel the whole night.
Q. You didn't go back onto the scow again?
A. Not that I remember.
Q. Did you see that rope that night after it was carried away?
A. I don't remember seeing it; I was too much excited getting the man out of the hold.
Q. Did you see it the next morning?
A. No, sir.

Cross-examined:

Q. Was there any other business being done there that night excepting hoisting coal?
A. No, sir.
Q. What time was it when you first went down into the hold of the vessel?
A. I couldn't say how soon I went down after the men, but I went down pretty soon after the men started.
Q. What time did the men start?
A. At six o'clock.
Q. Very soon after they went down there?

A. Well, pretty soon; it might be some time; I might stand around the hatch for a while, and then go down afterwards.

Q. Half an hour?

A. It might be half an hour and might be more.

Q. Might be more than an hour?

A. I don't know; I don't know, but perhaps I might have went down along with them.

Q. Not more than an hour?

A. No, sir; not more than that.

Q. How long did you remain there when you went down the first time?

A. Couldn't tell that.

Q. You don't remember that?

A. No, sir.

138 Q. Do you remember anything which called you away from the hold?

A. No, sir.

Q. You don't remember, then, when you went out of the hold after you went down there first time?

A. Not exactly, I don't.

Q. Do you remember what you did—where you went when you left the hold?

A. Not before I went down on the scow; I don't know where I went.

Q. What time was it when you went down on the scow?

A. As near as I can come to it it was somewheres about half past nine o'clock.

Q. And you can't remember anything that took place there that night from the time you went into the hold at six o'clock down to half past nine when you went onto the scow?

A. I remember I had a lot of men working.

Q. Only a general recollection?

A. Yes, sir.

Q. You don't remember what you were doing?

A. Going around from one place to another.

Q. That would be your duty?

A. Where the men were working.

Q. Having charge of the gang it would be your duty to go around and see that the men were doing their duty?

A. Yes, sir.

Q. And see that the apparatus was all right?

A. That I very seldom looked after—the apparatus.

Q. You did that night?

A. Not until my attention was called to it.

Q. What did you go down on the scow for?

A. I was called down there.

Q. Who called you?

A. I couldn't say.

Q. Did the man who called you state what was required of

139 you; what was wanted of you down there?

A. I was down in the ship's hold at the time, and some of

the men overhead that was wheeling or dumping, I don't know which, perhaps one of the men that might be picking up slack coal, told me I was wanted down on the scow to look at the fall. I got up and went down on the scow then.

Q. You do remember now a little bit what it was that called you out of the hold?

A. Yes, sir; when it comes to that I do.

Q. You went over on the scow?

A. Yes, sir.

Q. Who did you see when you first got there?

A. I couldn't exactly say which of the three men I first seen when I got in there.

Q. Who first spoke to you?

A. I think it was O'Brien; I am not positive of that either; whether it was Mr. O'Brien or Jo. Redmond.

Q. Do you recollect, without stating, what it was that was first said to you when you first got down on the scow?

A. I think the first thing that was said to me was to look at this fall?

Q. And you looked at it, did you?

A. Yes, sir.

Q. What did you do that for?

A. To see what was the matter with it, of course.

Q. You thought it was your duty to, didn't you?

A. I considered it was my duty then to do it when I was sent for.

Q. There was nobody else there that you knew of whose duty it would be to look after that fall at that time but yourself, was there?

A. No, sir.

140 Q. What part of the fall did O'Brien tell you to look at?

A. The part which he told me to look at was on the outside of the scow at the time, and he hauled it in, and I looked at it then, and I saw the turns were worked out of the fall.

Q. What was it you testified to on your direct examination in regard to some part of the rope not being in the house?

A. I don't know as I understand you.

Q. I ask you what it was you testified to on your direct examination about this rope, or a part of it, not being in the house on the scow?

A. I think it was the same thing as I said now.

Q. Will you excuse me if I ask you to repeat it?

A. Repeat what; where the fall was?

Q. What you said about some part of the rope not being in the house on the scow?

A. The part of the rope the turns were worked out.

Q. I don't ask you that.

A. What is it?

Q. Did O'Brien point out to you the place of the rope that he wanted you to look at?

A. We hauled it in; I am not positive whether it was him or me hauled it in; I couldn't say for certain.

Q. When you went away what did you say to O'Brien?

A. I told him to look out for that fall, and if the turns came out of it again to take the fall off and put them in again.

Q. What did you tell him that for?

A. So as to keep the fall in working order.

Q. Hadn't you fixed it?

A. Yes.

Q. Did you think that you had done all that could be done?

141 A. I considered I done all I could do at that time.

Q. You could have taken the rope off and put a new one on?

A. Yes; I could have done that, but I thought the fall good.

Q. With that exception I understand the only thing you could do was to put the turns in and dip it in the water?

A. I thought when I put the turns in the fall and dipped it in the water it was good enough; I am not an expert in rope, though.

Q. (Untwisting the piece of rope.) Is that what you mean by the turns coming out?

A. Not that way.

Q. Take that rope and show us what it is when turns are out.

A. (Untwisting the rope and taking the turns out.) Like that.

Q. Is that the way that rope looked?

A. Not quite as smooth as that; it was a little jagged like.

Q. Jagged?

A. Well, not jagged; as if it was a little chafed; parts sticking out a little like.

Q. How much?

A. I wouldn't say how much; I didn't examine.

Q. You didn't examine?

A. The turns was all I looked out for.

Q. Who rigged that fall?

A. I couldn't say who rigged the fall.

Q. So of course you didn't see it rigged?

A. No, sir.

Q. Did you look at it after it was rigged before they commenced to work it?

A. No, sir.

Q. You didn't look at it?

A. No, sir.

Q. When you noticed this part of the rope where the turns were out was there a mark around the rope?

A. There must be a mark near the drum somewhere; where he was going to hoist to.

Q. Was it near this place where the turns were out?

142 A. The mark? I don't think it was very close to it.

Q. You won't swear that it was not there?

A. Not exactly where the turns were out.

Q. Who was down in the hold of the ship?

A. I don't believe I could mention all the names now.

Q. Could you mention any?

A. I can mention Mr. Carey there; John Foley, John Carroll,

and I think a man by the name of Tim. Lane; Charlie Flynn, I think. That is about as many as I can mention now.

Q. What first attracted your attention to the fact that something had happened there in the hold?

A. I was down in the hold at the time I heard the tub fall.

Q. What did you do then?

A. I was in the wing taking out the coal at the time, and I looked up and looked all around me, and I saw the men all running toward the hatch, and I run there too, and I saw Mr. Carey was lying there.

Q. Do I understand you to say you picked him up, and put him in the skid, and took him to the upper deck?

A. I didn't say I picked him up.

Q. What did you say?

A. I said I went up out of the hold to get a skid to have him hoisted up.

Q. What was your habit in regard to giving directions to a gang of men; did you haul them up in a line like a platoon of soldiers?

A. No, sir.

Q. How did you communicate your orders?

A. All the orders I had to communicate was if the work was stopped to find out what was the matter, why they were stopping, and find out what they were doing at the time.

143 Q. When you set them to work at any time?

A. I never set them to work.

Q. You never set them to work?

A. No, sir; the stevedore always does that.

Q. After they were at work, if you wanted to give them general orders, so that they could all understand the orders, what would you do?

A. I had no occasion to give them general orders, because the stevedore always tells them where to go to when he is setting them to work.

Q. You never, then, gave general instructions to them when they were all together, any particular gang?

A. A gang of men working in the ship's hold, and I going around, and I see tubs knocking against one another, and I would sing out: "Look out down there; keep clear of that hatch as much as you can."

Q. Gave them warning?

A. Yes, sir.

Q. But you never got the gang of men together that were on board and gave them express orders when they were down in the hold of the ship, or hold where tubs were going up and down and coal being shoveled in and out, and say: "Now, look out or you will get hurt."

A. No, sir; I didn't.

Q. When you would sing out down in the hold what would you say?

A. I would tell them to look out down there; to keep clear of the hatch as well as they could.

Q. They had to be pretty near the hatch, didn't they?

A. Sometimes they had to be around the hatch.

Q. To unhook and hook on and off tubs they had to be around the hatch?

A. Yes, he had to be around the hatch; he needn't stand under the hatch.

144 Q. Well, without standing there, to keep as clear of the hatch as they could?

A. He needn't stand under the hatch. A tub comes up each side of the hatch, and he hooks on his tub here and stands back, and a tub comes down in the other side and a man catches that tub.

Q. Suppose as he hooks on a tub and it goes up nearest him the other tub is going down on the other side; he will have to step forward or reach forward and draw it in, wouldn't he?

A. Yes, sir.

Q. Suppose an order is given to cross whips, then he has got to step under.

A. Yes; he has got to step under.

Q. He has got to step right under the hatchway in order to cross the whips?

A. No, sir; he hasn't got to go across the hatchway.

Q. What has he got to do to cross whips?

A. He stands at the end of the hatch like.

Q. What is crossing whips?

A. Working both tubs in one side when the other side is all out.

Q. How are those tubs to get over on the other side?

A. The man dumping or steadying the tubs gives them the swing over.

Q. The man down below has nothing to do with it?

A. Nothing to do with it.

Q. Hasn't he?

A. He has got to catch his tub if he can.

Q. He has got to catch it the best he can?

A. Yes, sir.

Q. Suppose one tub came down there, and he couldn't get hold of it without stepping under the hatch, would he be doing his duty?

A. Yes, I suppose certainly he would, because several times it does go down that way.

145 Q. No, no; but if Carey let it go down on the other side of the hatch without going to get it, and let it stay there, would he be doing his duty?

A. Well, if he was in any danger he hadn't to go out, I don't think.

Q. Then all of your time that night was spent either down in the hold or on the scow; you were nowhere else?

A. No, sir; I didn't leave the ship from the time we went to work until I went down on the dock to look for the skid and to find some one to carry him up to the hospital; not that I remember.

By the COURT: When did Mr. Craven go away that night?

A. About nine o'clock.

Q. You knew he went away, did you?
A. Yes, sir.

Redirect:

Q. Was it, in your judgment, necessary, when you saw the rope and saw that the turns had come out, to take it off and put on a new rope?
A. I don't think it was; not if the fall was attended to.
Q. Do you know whether a rope will chafe more if the turns are out than if the turns are in?
A. Certainly it will.
A. It will chafe more if the turns are out?
A. Yes, sir.
Q. Was it the duty of either man down in the hold at the hatch, on either side of the hatch, to step out under the hatch, while a loaded tub was going up, for any purpose?
A. A man is never supposed to put himself in danger if he can avoid it.
Q. Was it necessary for him to do so?
A. Well, it was necessary for him to do so to catch the empty tub.
146 Q. Could he not have waited until the loaded tub was on the upper deck?
A. The other tub would be landed and then he couldn't get it where he wanted it, perhaps.
Q. Did you look at the fall when O'Brien called your attention to it?
A. I just looked at the part where I see the turns worked out of.
Q. Wasn't it the duty of Mr. O'Brien to look after that fall as well as you?
A. The man that runs the drum in the scow, hoisting, is always supposed to look after the fall, and if it is bad to report it.

Recross:

Q. You have testified, I think, that it was not necessary to put in a new rope for the one in which you say the turns were out, and in which you had put the turns in and steeped it?
A. When I saw the turns were out of the fall if I thought it was necessary to put in a new rope I would have done it; in my opinion I thought the rope was good enough.
Q. And in going away you told O'Brien "just look after that rope," did you?
A. I told him to look out for that fall; that has been told several times to the man on the scow that runs the drum, to look out for the falls.
Q. Do I understand you that in your opinion at that time it was not necessary to put in a new rope, provided O'Brien would keep his eye on it and look after it?
A. I don't know whether the man looked after that fall, but I told him that.

Q. I understand that you have testified that in your opinion that rope was good enough, provided it was looked after?
147 A. I thought it was.

DEFENDANT'S COUNSEL: Q. And he was to look after the rope to keep the turns in it?

A. I told him to look after it, and if the turns came out any more to put them in.

Q. Why did you tell him that?

A. Because if the turns all get out of the fall it will break certainly; you take the turns all out of a rope and let them keep out.

Q. Did it look as if the turns were likely to come out again?

A. They always will naturally work out working a single rope.

Q. Well, in that particular place?

A. O, no; different places; not any one particular place, I suppose.

Q. But I mean this particular place that you told O'Brien to look out for the turns, was the reason that you told him to do that because you thought it would be safer for him to keep his eye on it?

A. Yes, I did; as long as they worked out first they might work out again.

The defendant, further to maintain the issues on its behalf, called JOSEPH REDMOND, who testified as follows:

Q. What is your business?

A. Attending to the boiler and engine on the scow.

Q. What scow?

A. On the Cunard Co.'s dock.

Q. Their hoisting scow?

A. Yes, sir.

Q. How long have you been employed in that way?

A. About two years.

Q. Prior to that time what was your business?
148 A. Working on the dock.

Q. Longshoreman?

A. Well, everything they required me to do. I remember the night that Patrick Carey was injured; that night I was in the scow tending to the engine and boiler; John O'Brien and John Higgins were on the scow; John O'Brien was running one of the drums and John Higgins was running the other. I remember Christy Geraghty's coming down on the scow; it might be a little under or over, but I think it was some time after eight o'clock. Before he came down my attention had been called to the rope by John O'Brien; that was the rope that was worked by his drum.

Q. What was the matter with the rope?

A. Well, he called my attention to it and we both looked at it, and I came to the conclusion, as far as I understand about the rope, that the turns was coming out of the fall; it was at the splice.

Q. Was there anything else the matter with the rope that you could see?

A. I didn't look anywhere else, only just the particular place that he drawed my attention to.

Q. At that place was there anything else the matter that you could see?

A. Nothing else that I could see excepting that.

Q. When Gerraghty came down did O'Brien point out the same place to him?

A. I am not exactly sure whether it was the same place or not; bnt he fetched him to show him the fall.

Q. Do you know what O'Brien said to Gerraghty?

A. He told him that he thought the fall wasn't fit for the business, or something to that effect.

Q. Do you know what Gerraghty did?

A. No, sir.

Q. Did you hear what Gerraghty said when he left the scow?

149 A. Yes, sir,

Q. What did he say?

A. He told him for to watch and look out for the fall, and if it required turns to put turns into it.

Q. What did O'Brien state then?

A. I don't know as O'Brien made him any answer or not; only went on with his work as usual.

Q. Was your attention called to the rope again that night?

A. Not that night any more. I heard of the accident that night.

Q. How long was this before the accident happened?

A. It might be two hours—maybe over and maybe under—or that way; we had no clock; just running by random.

Q. Was it some time before the accident happened that Gerraghty was down there looking at the rope?

A. Gerraghty was down there maybe an hour and a half or an hour.

Cross-examined:

Q. That is, more or less; you can't really fix it?

A. No, sir.

Q. Where was your engine located?

A. On one end of the scow; on the back end from where the fall was.

Q. How far was the engine from the drum?

A. The engine and the drum connected quite close together; they might be a foot or six inches—the driving shaft from the drum.

Q. They are right near together?

A. Right close together; the shaft runs between the four drums.

Q. As near together as we are here?

A. O, yes; quite nigh.

Q. And you could overhear everything that was said?

A. As long as I was inside; something might call my attention somewhere else.

150 Q. Is your memory good?
A. Pretty good.
Q. Do you remember talking with anybody about this case before you went on the stand?
A. No, sir.
Q. Don't you remember talking to me?
A. Talking to you no more than just what might pass between us here when you called me in that day.
Q. When Mr. Sturgis, defendant's counsel, was here?
A. Yes.
Q. Do you remember my asking you whether you could throw any light on this matter, or something to that effect?
A. Something to that effect.
Q. Do you recollect what you told me?
A. I told you I was there.
Q. Anything else?
A. No, sir; nothing else.
Q. You don't remember anything else you told me?
A. No.
Q. Didn't you tell me something and say that that was all you remembered about it?
A. I might say something that way; I don't recollect.
Q. Don't you remember?
A. No.
Q. Don't you remember saying that you didn't know much about it, but you overheard Gerraghty and O'Brien talking about steeping?
A. I might say that.
Q. Will you swear you didn't say it?
A. Maybe I did and maybe I didn't.
Q. Don't you remember it?
A. I don't remember as I did say it.
Q. Will you swear you didn't?
A. Not to my recollection; I don't think I did.

Redirect:

151 Q. When was this conversation that Mr. Shook, plaintiff's counsel, refers to?
A. The other day when we were up here on the trial, I suppose; he called me back here.
Q. Friday, wasn't it?
A. Yes, sir; I think it was Friday.

PLAINTIFF'S COUNSEL: Q. Have you talked with anybody since then?
A. No, sir; I have talked with people, but not on that subject.

DEFENDANT'S COUNSEL: Q. Don't you remember now that there was something said then about dipping a rope in water?
A. I heard them saying about dipping a rope in water, but I didn't take any notice to it.
Q. Who did you hear say it?

A. I couldn't say who I heard say it; I hear so much talk about ropes so often that I can't recollect everything.

Q. You don't remember seeing this rope dipped in the water?

A. No, sir; I do not.

The defendant, further to maintain the issues on its behalf, called ROBERT GRAHAM, who testified as follows:

Q. What is your business?

A. Rigging up ships and getting them ready for coaling, discharging cargo, and also taking in cargo. I am employed by the Cunard Steamship Co., and have been in their employ 13 years. Before that time my business was going to sea. I went to sea between thirteen and fourteen years.

Q. In what capacity?

A. I have been before the mast, and had the billet of second mate, and the last I had was mate. I was mate, as near as I could judge, twenty months.

152 Q. During your experience have you had opportunities to handle ropes?

A. Yes, sir.

Q. To what extent?

A. Considerable.

Q. Can you tell, when you see it, whether a rope is in good condition or not?

A. Most assuredly. I superintended the rigging of the fall the evening that Carey was injured on the Batavia; I saw that fall.

Q. What was its condition?

A. Good enough; good enough for a coal fall.

Q. Did you see that there was a splice in the fall?

A. Yes, sir; I took notice of a splice in it; the splice was, as near as I could judge, about five feet; somewhere about that, I guess. I got that fall from the store-house. I have been familiar with splicing ropes; have spliced ropes myself—quite a number.

Q. What do you say as to this splice, whether or not it was a good one?

A. Well, it was an expert hand that put that splice in; it was a good splice.

Q. Where did the splice run after the fall was rigged?

A. As nigh as I can remember, it run from a block in the davit to a block in the scow; it traveled between them two blocks.

Q. While the fall was being worked?

A. Yes, sir; whether it went inside of the scow, I can't say, but it traveled between the two blocks; that distance between those two blocks, to the best of my recollection, was between twenty and twenty-five feet, as near as I can remember.

153 Q. In your judgment, would the splice in that rope weaken its strength for hoisting coal?

A. No, sir; not as long as the turns didn't get out.

Q. Do you know whether or not it has been usual to use such falls with long splices in them?

A. We are using them at the present day.

Q. And prior to this time, November, 1880, had you been using such falls?

A. O, yes, sir; we did.

Q. For how long a time, as you remember?

A. As long as I went on the dock; there is splices always in coal falls.

Q. And no danger is to be apprehended from the fact of the splice in there, if the turns are kept in the rope?

A. None whatever, according to my judgment.

Q. Is it a usual thing in working a rope as a single rope for the turns to come out?

A. O, yes, sir; the turns will come out.

Q. You can't very well prevent that, can you?

A. No; not very well.

Q. What do you say as to the effect of dipping such a fall as this was in the water?

A. All I can say, the rope, being Manilla, by wetting it it shrinks it right up; the yarn lays harder together—packs harder.

Q. Does it tighten the turns?

A. Well, yes, sir; it shrinks it right up, and the turns have got to come together.

Q. Does it, in your judgment, weaken the rope for working during a night?

A. By wetting it?

Q. Yes.

A. No, sir; it don't; no sense in that.

Q. Where did you get this fall?

A. In the store-room.

154 Cross-examined:

Q. Who gave it to you?

A. I believe I took that fall myself, as far as I can remember. I cannot swear that I took it myself.

Q. Have you had any conversation with Carey?

A. Never spoke to the man but twice or three times. I might say how do you do; that is about all.

Q. What was the last time you saw him?

A. Now and yesterday.

Q. I mean before this trial?

A. Some time since—two months, three months.

Q. Did you have a conversation with him then?

A. No, sir; he had some raffle, or something another getting up, and was speaking about tickets; that is all.

Q. When did you see him before that?

A. I disremember. I think I saw him on the dock or in Hudson street. I can't say.

Q. Did Carey ever speak to you about the rope?

A. No, sir; never to me; never to my knowledge.

Q. Did anybody else say anything in your presence?

A. No, sir; not that I know of.

Q. Did you see Carey after he came out of the hospital?
A. I don't know what time he did come out of the hospital.
Q. He came out of the hospital in March, 1881, and then he came out of his house somewhere long in June or July; did you ever go to his house to see him?
A. Never.
Q. Did you see him just after he got out of the house, somewhere along in the summer of 1881?
A. I don't remember.

Q. Do you remember two occasions before this trial on
155 which you saw him and had conversations with him?
A. Yes; to ask how he was getting along.

Q. Didn't you say to Carey that Smith gave you that rope, and you threw it back and told him that it wasn't fit for use, or words to that effect?
A. Never.
Q. What, principally, is the cargo of the Cunard Steamship Company?
A. Well, fine goods; iron, &c.
Q. What is most hoisted by falls?
A. You can take up anything at all that averages twenty-five hundred with a single rope; but we generally use wire.
Q. How much can you carry up on falls?
A. Three hundredweight—thirty-five hundredweight; not on a single rope—on a wire purchase, I am speaking of.
Q. I ask you what is the usual weight that is hoisted on falls like this we are speaking about now?
A. Well, twenty-five hundredweight; twenty hundredweight.
Q. Sure about that?
A. O, yes, sir; it is good for twenty hundred.
Q. What packages are there ordinarily that weigh twenty hundredweight?
A. Three cases together.
Q. Three cases of what?
A. Why, there is different kinds. I can't tell the contents of the stuff.
Q. You have some idea what is in a box?
A. No, sir; we ain't supposed to know.
Q. How do you know the weight?
A. Sometimes you see it on it, marked on a case.
Q. What do you see of that character marked?
A. I saw the cases marked; saw the weights.

156 Q. Just the weight alone?
A. Yes, sir; the weight alone.

Q. You don't know what was in the cases?
A. O, no, sir; we ain't supposed to know what is inside of a case.
Q. What cargo is hoisted the most readily, as a rule?
A. The quickest?
Q. Yes; the quickest.
A. They take up fine goods pretty quick nowadays—dry goods.
Q. That is the quickest?

A. I wouldn't say it is much quicker than coal; coal is quick.

Q. What, so far as you remember, is the heaviest cargo that is carried up; I mean the articles in the cases; that is, the articles themselves, whether beef, or bacon, or what it is?

A. Provisions; they run from five hundred to seven hundredweight; that is about the heaviest, and dry goods and coal are the quickest.

Q. I will ask your opinion now as an expert; I suppose that with provisions the strain on a rope would be greater than the strain of dry goods?

A. I don't understand you.

Q. What do you understand strain to mean?

A. To tighten on a rope, the tautness on a rope; that is what we call a strain.

Q. The strain is greater in hoisting provisions than in hoisting coal or dry goods?

A. Hoisting provisions; there is not as much weight on a fall with coal as it would be in a package of bacon.

Q. The strain is greater?

A. Yes, sir.

Q. Then isn't the friction greater the more quickly the rope goes?

A. I don't know the meaning of the word friction.

Q. If a rope goes through a block very quickly the friction
157 is apt to be greater?

A. I don't know, I am sure; I can't answer you that question; it is according to the kind of a rope.

Q. You don't know?

A. I couldn't answer; I judge it was according to the kind of rope.

Q. Take this rope that size (three and three-quarters); if it goes through a block quickly it will wear away more quickly than if it goes through it slowly?

A. According to the weight that is on it.

Q. Well, no matter what the weight is; supposing you should take that and begin to work it through a block; the quicker you worked it the greater would be the friction?

A. I think so.

Q. Was that rope that you say was spliced spliced like that?

A. Well, I can't swear, but the man acknowledges that spliced the fall that this is the way he spliced the rope.

Q. Who was the man?

A. Smith.

Q. The man that has been on the stand this morning?

A. Yes, sir; that is our storekeeper.

Q. That looks like his splice?

A. That is his way of splicing a rope.

Q. Did the ends stick out that way?

A. He leaves them out for to allow it to stretch; that rope will give, you know, from an inch to a foot.

Q. Had these ends that hang over to run through falls?

A. Yes, sir,

Q. Wouldn't they be apt to jam off one way or the other?

158 A. It might be a little shorter than that; if that was stretched it wouldn't be as big as that.

Q. If that splice is stretched out the ends are apt to be a little higher than the surface of the rest of the rope?

A. According to the splice.

Q. That you say is according to the way Smith spliced?

A. Yes; that is the way that he splices his ropes.

Q. What is the space between the wheel of a pulley that that rope would go through; the space between the wheel of the pulley and the outside?

A. The swallow, I call it.

Q. That swallow is the space between the wheel and the outside of the block?

A. Between the sheave and the neck of the block, if I can understand you, where they reeve through.

Q. How large was that space in the block on that fall that night?

A. This rope goes through two different kinds of blocks; there is one block an inch and a half. There were two different kinds of blocks on that fall. One I can run my three fingers in the swallow of the block, between neck of the block and the sheave.

Q. Do you know what is the difference between the two kinds of blocks you used that night?

A. There was one stationary on the scow and the others were put up wherever we wanted to discharge; they are supposed to be there during the time that those falls are working; that block on the scow belongs there, and they have got as much room as my three fingers will go in.

Q. And that is down on the scow?

A. Yes, sir.

Q. How about the block above?

A. The block above has got an inch and a half, I should judge.

159 Q. How about the other blocks?

A. There was two wooden blocks; the block on the scow where they hooked on and the block on the davit.

Q. What size was that on the davit?

A. About an inch and a half in diameter, I should judge. I know three and a half and three and three-quarters rope reeves right through it easy when the rope is dry; it reeves through it, you know.

Q. What is the most dangerous cargo for hoisting on a ship?

A. The smaller the packages is; small iron and the like [of] that, the small iron falling out of a sling is dangerous.

Q. It don't depend, then, upon the weight of the packages?

A. We never overrun the weight; never overrun twenty-five hundredweight.

Q. What is the most dangerous cargo that is hoisted on these falls?

A. The most dangerous is small pig-iron; I should judge so.

Q. Why is that so?
A. It is small—short; liable to fall out.
Q. Out of where?
A. Out of the sling.
Q. What kind of a sling or fall do provisions go up in?
A. Two parts of a rope.
Q. How do you mean two parts?
A. That way; this bight is put around the packages.
Q. Then is the rest of the rope doubled up; the rest of the *rest of the* rope is used just the same?
A. The one bight goes right through the other bight like that, and hooks on the purchase of this bight.
Q. And then goes up on a hook?
A. Yes, sir.
Q. What kind of a fall do you use for that?
160 A. A three and a half rope.
Q. For packages of provisions?
A. A three and a half rope.
Q. Did you see who rigged that fell that night?
A. I had two men on the gaff, and which of the men rove the fall I can't say; one of them I don't know; I have been thinking, and can't bring him to my recollection.
Q. You had charge of the rigging?
A. I had charge of all the rigging of the ship; I had the power to direct the men to go on rigging.
Q. You don't remember who you directed to rig that?
A. There was two men on the gaff, and one of these men, I think, rove it; put it through the sheaves.
Q. What is that, putting it through the pulleys?
A. Putting it through the pulleys, as you call them.
Q. What was the other man doing?
A. He was lending him a hand to haul up the block, &c.
Q. But you don't know who they were?
A. There is one I know; his name is Short; if he is living he is on the Cunard dock; I left him there this morning.
Q. You haven't seen him in court here?
A. Yes; he was in court last week.
Q. The other man you don't remember?
A. I have no recollection who he was.
Q. How long had Short been in the employ of the Cunard Steamship Company?
A. He has been there ahead of me.
Q. An old rigger?
A. Quite an old rigger, yes.
Q. Why did you say that that fall, which you are not certain whether you took from the store-room or whether Smith gave
161 it to you, was good enough for a coal fall?
A. Did I say that?
Q. Why did you say that?
A. I didn't say that to anybody.

Q. Didn't you say, on the direct examination, that you thought that fall was good enough for a coal fall?

A. Yes; good enough for a coal fall.

Q. What did you mean by that?

A. Well, it was good enough; what I meant to say, it was good enough for a coal fall; I don't know of any meaning to it; we have got ropes there for coal falls; this (referring to the rope in court) is for cargo.

Q. You meant something when you said that was good enough for a coal fall; you had something in you mind when you said that?

A. You humbug me because you speak so quick.

Q. You don't understand what my question is. What I mean to have you tell us is what you meant when you said that that rope, that you either took out of the store-room or Smith gave you, was good enough for a coal fall?

A. I don't know whether I have got any meaning to it at all; I can find out no meaning to it.

Q. I can't do it either; that is just my idea about it. I wish you would explain, if a fall is good enough for one thing, why is it not good enough for another thing; thus letting us think it is not good enough for hoisting some other kind of packages?

DEFENDANT'S COUNSEL: Q. Do you claim that they should have had something that was better than a coal fall?

PLAINTIFF'S COUNSEL: We claim that we were not entitled
162 to have anything better there than a good coal fall.

Q. I want to find out if there is anything that that rope was not good for?

A. I mean to say that we don't take the like of that (indicating an unused piece of rope) down for a coal fall if the like of this was there; that is, for cargo—for twenty-one hundred or twenty-five hundredweight or over and this would be for coal.

Q. Then you didn't have any reference to whether your rope was spliced or worn, but only to the size of the rope?

A. That is the same size of rope as that; most assuredly.

Q. But your remark had no reference at all to the condition of the rope; that is, as to whether it was a new rope or old rope, whether worn or not, but only to the size?

A. That is about the only size of rope that we had around there.

Q. That was the only size?

A. Might have two and a half; might have three, and three and three-quarters.

Q. Did they have more than one kind?

A. I don't know.

Q. Then if it was good enough for a coal fall it was good enough for anything?

A. You couldn't expect the like of that to lift twenty-one or twenty-five hundredweight.

The COURT: He means that what was good enough for three hun-

dredweight might not be for twenty-one or twenty-five hundredweight.

The WITNESS: Yes; that is what I mean.

Q. Would splicing a rope for hoisting coal strengthen it?

A. Well, you can answer yourself by this here; you have got four strands there, and on this there is a three-stranded rope, and that will tell.

163 Q. I want your opinion.

A. That is my opinion right away.

Q. That it makes it stronger?

A. Most assuredly, I should judge.

Q. Suppose the rope is worn and splices where it is worn, would that make it stronger?

A. You have got the same quantity of strands again.

Q. Suppose the rope is worn?

A. You have got the strands the same as that; that is, the support for that strand; it is under here and over this way (indicating the mode of splicing), and you have got two strands all the time.

[Q.] Suppose the strands are worn right down, not merely open, but fagged out, the whole part, before it is spliced, and then you splice it, would that make it any stronger?

A. You couldn't splice it if it was fagged out like that; what are you thinking about; you couldn't splice it.

Q. What causes the turns to come out of the rope?

A. A single part of a rope, if you lift, say, a tub hooked to that, and that comes up and strikes the bulkhead, and comes up quick and keeps going on that way (indicating a rotary motion).

Q. Then a coal tub on a fall of that kind coming up is more apt to wheel around than almost any other package?

A. If a man lets go; it is according to where it is hooked on; if a man hooks on a tub and it comes up and strikes the bulkhead, for instance, it has got to turn around.

Q. It is more apt to turn around than almost any other kind of package?

A. I don't know.

Q. You don't know?

A. No, sir; I couldn't answer that.

Q. Does dipping a Manilla rope in water strengthen it; I
164 understand on your direct examination you testified it didn't weaken it?

A. As long as it keeps wet I believe it strengthens it, most assuredly.

Q. As long as it keeps wet?

A. Yes, sir.

Q. What is the effect of water on a rope?

A. You understand this Manilla (holding up a new rope)—this shrinks right up, just the same as a clothes line you see hanging out of a tenement building; it is all slack and it comes on to rain and that tightens right up; and it brings the pole along with it if the

pole ain't very tight; the same as a pair of woolen pantaloons, it shrinks if it gets wet; the rope is the same way.

Q. Is the rope stronger for that?

A. If it keeps wet right along.

Q. When it gets dry?

A. I want to explain that; look here now, counsellor, you ask me a question, does it make it any stronger; I think it does.

Q. While it is wet?

A. Yes, sir; while it is wet; supposing a rope there; now you keep that rope wet and that rope is stronger. If that rope is kind of flattish and you keep that rope wet, that rope has got to come right up—that brings it rounder—brings it to its natural state and shrinks it. When a rope is working a single part it naturally gets an angle on the edge; it flattens a little; if you wet it, it comes right close up in its natural way. For instance, put the ends of that rope together (holding up a broken rope); that is how that rope was when it was dry; I think Carey can tell you the same—
165 now working, when it is wet that rope fills full of turns and twists right up.

Q. Do you mean that wetting it will kink it?

A. Yes, sir; I mean it gets full of turns. I have known that kind of rope with the turns in and twisted when they dried out again it dries right out; so that shows what the effect of water is on a rope.

Q. I understand from your explanation that the effects of water in the first place is to bring the strands down to their place?

A. Yes, sir.

Q. And then another effect is that it makes the rope kink up as you have described and illustrated to-day before the jury, and that there are men in the store-house or elsewhere who have to spend some of theirt ime in pulling out some of these kinks?

A. Not directly; they splice them so as they can make the slings.

Q. What is the condition of a rope that has been steeped, after the water has got all out of it?

A. I couldn't answer you that.

Q. You wouldn't like to answer that?

A. I could not.

Redirect:

Q. Coal falls are not used to hoist cargo with, are they?

A. By no means.

Q. You have regular cargo-hoisting apparatus on the dock?

A. We have on the dock.

Q. You had it there in 1880?

A. In 1880, and way years back again. But excuse me a minute; when we are working purchases or whatever you call it, wire purchases, there is no dock on the river that has got the same apparatus as we have.

166 Q. (Showing witness a spliced rope identified by Smith as one of his splices.) Is that, in your judgment, a good splice?

A. A very good splice; very strong indeed; any man howsomever can see that.

Q. Is it, in your opinion, possible for that splice to draw unless the turns come out of the rope?

A. Never in God's world; any man can see that.

(The spliced rope is offered in evidence as an illustration for the jury.)

Q. About these blocks on the coal scow; I did'n understand you fully with regard to their size?

A. Do you want to find out the swallow that this block has got where the rope goes through?

Q. I want to know whether a rope like that that has just been shown to the jury (a three and three-quarter rope) would go through the block on the coal scow?

A. A. Yes; why my three fingers; I could heave my three fingers right through it.

Q. With a splice like that, would it go through easily?

A. Through the blocks in the scow? yes; perfectly easy.

Q. Did this splice run through the block on the gaff?

A. O, no; that splice didn't go to the block on the gaff; I can swear to that.

Q. When you got this rope from the store-house did you throw it back and say it wasn't fit for use?

A. No, sir; O, no, counsellor, it is a fib when you say that.

PLAINTIFF'S COUNSEL: I didn't ask you that.

The WITNESS: I think you did.

167 Q. Was that rope fit for use that night when you superintended the rigging of it?

The WITNESS: I will swear to that; it must be good enough if a coal fall could work five hours and a half, according to the men that *has* been there, or somewheres about that; it went into working order at six o'clock when I left it; I understand they *was* working it for five hours and a half.

Q. (Repeated.) Was that rope fit for use that night when you superintended the rigging of it?

A. Yes, sir; it worked five hours.

Recross:

Q. How long had that rope been used?

A. I cen't tell you that; I can give you a rough guess; it works two days a week.

Q. I want the facts; not your guesses?

A. Well, after facts, it is.

Q. Suppose that rope had been in use for nearly seven months, would you think it then safe to send it out for further use without being a little more careful than if it was a brand new rope?

A. Then I do not understand you; make your words a little more shorter and I can catch you.

Q. If that rope had been in use on the dock for seven months hoisting coal, would it have been as safe to hoist coal that night as if it had been new?

A. I will answer you that. Who says that this rope that we are speaking about was in use for seven months?

PLAINTIFF'S COUNSEL: Mr. Smith says so.

DEFENDANT'S COUNSEL: I submit that that is not the testimony.

168 The WITNESS: It was only used two days out of the week.

Q. Then was that a new rope?

A. I don't know what it was.

Q. You don't recollect whether it was new or old?

A. It was not a new rope.

Q. Now, will you answer my question? I asked you whether if that rope had been in use for seven months, or nearly seven months, it would have been as safe as when new?

The COURT: Seven months' use continuously, six days in the week, is what that question means.

A. No, sir; it was only used two days in the week.

Q. Do you know how often that rope was used?

A. Two days in the week.

Q. Do you know when that rope was purchased—when it came to the store-house?

A. The store-house keeper can give you that in black and white; I did not bother myself about that.

Q. He has testified that it came into the store-house on the 13th April, 1880, so that it has been used from that time down to the third of November.

DEFENDANT'S COUNSEL: I submit that Mr. Smith did not say it had been used all that time.

PLAINTIFF'S COUNSEL: I did not say it had been used all the time.

Q. The question is whether an old rope is as good as a new rope? That is all that question was.

A. Whether an old rope is as good as a new rope?

Q. Yes.

A. Well, no, sir.

169 The defendant, further to maintain the issues on its behalf, called NAPOLEON B. SINCLAIR, who testified as follows:

Q. What is your business?

A. Stevedore; I have been stevedore twenty-six years.

Q. What kind of vessels have you stevedored?

A. All kinds. I have been stevedore for the Great Eastern five voyages, and also worked on the London line of steamers formerly, when it first ran—steamers ran here from London. The business of a stevedore is loading and discharging ships.

Q. In the business of loading and discharging vessels, have you been accustomed to use what are called single falls?

A. Yes, sir.
Q. To any extent?
A. Yes; more or less all the time.
Q. Have you had any experience in discharging coal from vessels?
A. Yes.
Q. In using a single fall, is it a usual thing for the turns to come out of the rope?
A. Sometimes they will and sometimes they will not.
Q. Has it been usual in your business to use spliced falls?
A. Very often; we use them when occasion requires.
Q. And how do you consider a spliced fall in regard to its hoisting capacity?
A. I consider it as safe as plain rope—rope not being spliced.
Q. Tell me, as fully as you can, what experience you have had in the stevedore business?
A. Since last January, about one hundred and eighty vessels—in that neighborhood.
Q. Since last January?
A. Yes.
170 Q. How many vessels in previous years?
A. I can't say; over one hundred usually every year.
Q. Over one hundred a year?
A. Yes.
Q. Do you consider yourself a judge of rope—spliced rope?
A. I can judge when splicing is properly done.
Q. Will you look at this rope (showing rope before referred to), and say whether you consider that good splicing?
A. (Examines rope.) Yes, I should consider that a good splice.
Q. Do you know what [the] effect of dipping a rope in the water would be?
A. If it was not dried, and put away wet, it would be likely to rot.
Q. What would the effect of dipping be on its use, suppose it was dipped in water and used two or three hours after that time?
A. It would not injure it, in my estimation.
Q. Suppose the turns had come out of the rope to a certain extent, and then had been put back again, and the rope dipped in water, what would be the effect of such dipping upon the rope two or three hours subsequently?
A. I do not think it would injure the rope.
Q. Would it be of any benefit to the rope?
A. I do not think it would be of any benefit.
Q. Would it tighten the rope?
A. Yes.
Q. Would it, in your judgment, have the effect of keeping the turns in?
A. Yes, for the time being.
Q. So long as it remained wet?
A. Yes.
Q. Is it customary, in your experience, when the turns of a rope come out to put them back again?
A. Yes.

171 Cross-examined:

Q. What is a single fall, Mr. Sinclair?

A. A rope running through a block, one end being in use for the hoisting purchase and the other end being used to lift the article, whatever it is.

Q. What falls are there other than single falls?

A. Two parts of a rope; sometimes we use three blocks, one block down with the rope through it, and up through two blocks aloft.

Q. And what do you call a fall that is not a single fall?

A. Double fall.

Q. Any treble falls?

A. According to the number of wheels in the blocks.

Q. What is the name of these falls?

A. Where the block itself goes up as the rope goes up, a rope running through two blocks, and both going up together, is what we call a double fall.

Q. Is a rope that is good for a single fall good for a double fall?

A. Yes.

Q. Require any stronger rope for a double than a single fall?

A. No, sir; it requires a stronger rope for a single fall, if they are lifting the same purchase, provided you lift the same weight.

Q. Do you know anything about the manufacture of rope?

A. No, sir; nothing about it.

Q. You say you know when rope is properly spliced; do you know a good rope when you see it?

A. No, sir; you can't always tell a good rope. A rope will
172 look very fair and still be very poor—the hemp.

Q. Do you know whether ropes of this character are made by machinery?

A. I do not know, of my own personal knowledge.

Q. Now, in regard to the turns of a rope. If a rope is very strong it requires great strain, I suppose, to take the turns out?

A. Sometimes, in running a certain way, working on a certain end of a rope, you will take the turns out, and in another way you will put them in.

Q. Will a good rope unturn as easily as a poor rope?

A. A slack-laid rope will unturn a little easier than when one is very tightly laid.

Q. Tightly laid—you mean wound tight?

A. Not altogether. These strands of the rope, if twisted tightly, will, when you come to lay it up into a rope, make the turns closer.

Q. That you call a tight-laid rope?

A. Yes.

Q. What do you call one that is laid that way (showing witness same rope)?

A. Where the yarns in the strand are laid loose.

Q. A tight-laid rope is one where the yarns in the strands are very tight together; consequently they make a tighter turn?

A. Yes.

Q. Which of the two kinds is the stronger?

A. I do not know that there is any difference as long as there is the same kind of weight on the rope.

Q. Is a rope, then, that is unturning all the time as good as a rope that does not unturn?

A. I do not know as it will unturn much more than a tight-laid rope; it may be a little longer than that (indicating). I do
173 not know, as long as it all bears the strain alike, as it will weaken it by the turns coming out. That is my experience.

Q. You testified that spliced falls are often used, when occasion requires it. Can you mention an occasion that would require it?

A. Sometimes your fall is too short, and you want to put another piece to it and make it longer, and then you splice it.

Q. Take a fall of one hundred and fifty or one hundred and seventy feet. Are there no coils of rope long enough to make that fall without splicing?

A. Yes, sir.

Q. Now, as between a spliced rope and one that is not spliced; where human life is at stake or liable to be in danger; where, as in this case, men were working about the fall in the hold of the vessel, where coal-tubs were going up and coming down, which is the safer—a spliced or unspliced rope?

A. I don't consider there is any difference as long as the rope is good all the way. If one part you splice on is poorer than the other, it would not be safe; but if it is the same kind of rope, I don't know as there is any more danger with spliced than unspliced rope; I do not think there would be.

Q. Suppose, so long as the rope is good and properly spliced, then it is as good as one that is not spliced?

A. I consider it as strong.

Q. Suppose a rope is worn some and chafed, and then it is spliced where it is fagged out, will the splice shrink from that?

A. No; I do not think it would.

Q. If a rope is properly spliced, will it part if it has a very
174 heavy strain?

A. I do not think it would be more likely to part than if it was not spliced.

Q. A rope that has unturned and then been dipped in water and re-turned, is that any more likely to part than before it unturned?

A. I do not know that it would be.

Q. Well, what do you think about it?

A. Well, I should not think it was any more liable to part unless it had been very much unlaid.

Q. Suppose it had been unlaid and the strands worn and then it was turned and dipped in water, is the rope any safer than it was before?

A. I should not think it was any safer.

Q. Has the water done it any good?

A. I do not think it has; it would add no strength to it.

Q. I understood you to testify that dipping a rope in water and putting it away wet would rot it; then are we to understand that your opinion is that the action of water on a rope is to rot it?

A. Yes; that is if it is left wet for any length of time.

Q. Suppose it is used while wet, what is the action of the water on the rope?

A. Stopped for a time, but while the rope is being used it will dry in so short a time as to have no effect; it will usually dry in a day.

Q. Then it will take a day to dry?

A. Yes, to dry it through.

Q. How long would it take to dry it half through?

A. Half a day, I suppose; it might take more; it might take less.

Q. Take this case; where the strands of the rope are unturned and worn away and re-turned and dipped again; what is your opinion; where they are hoisting coal-tubs full of coal
175 weighing somewhere about two hundred and fifty or three hundred pounds; can you tell us what would be the action of the water on that rope after it was dipped?

A. No, sir; I do not think I can.

Q. What is the immediate action on the rope?

A. I do not know as it would have any immediate effect.

Q. How long does it take to have an effect?

A. I don't *as* know as it would have effect on the rope, provided it was used and dried that day.

Q. I asked when it would commence to have an effect?

A. I don't know; could not tell. I don't think it would have any effect at the time.

Q. Supposing the rope to be used continuously, how long after it was dipped in water would the water begin to have an effect upon it?

A. I think the effect would be so slight, if it dried the same day, you would never notice it; the bad effect.

Q. Bad effect you say?

A. Yes.

Q. Well, what would the good effect be?

A. No good effect.

Q. Will a rope that has been dipped, as we have described, tend to make the rope kink?

A. Yes.

Q. Is a rope that kinks as safe as a rope that does not kink?

A. Used as a fall, I do not think it is.

Redirect:

Q. The effect of dipping I understood to be to tighten the rope?

A. Yes.

Q. Would that strengthen the rope?

A. I do not think it would affect it.

176 The defendant, further to maintain the issues on its behalf, called THOMAS SHORT, who testified as follows:

Q. What is your business?

A. Longshoreman.

Q. Where?
A. At the Cunard dock.
Q. How long have you been engaged by the Cunard Company?
A. Sixteen years.
Q. As longshoreman?
A. Yes; and I am a sailor man, too.
Q. Do you remember the occasion when Patrick Carey was injured?
A. I was not there at the time.
Q. When you came down to the dock next morning you heard of it?
A. Yes.
Q. Did you have anything to do with rigging falls for hoisting coal?
A. One of the falls.
Q. Do you remember what fall it was?
A. No.
Q. Was Graham there superintending the job?
A. Yes; he told me to go down to the store-room and get a fall. I went there and told David what I wanted, and I was a long time away, and Mr. Graham came down after me; he saw a fall there and asked David what the length of it was, and David told him twenty-five fathom; Graham said "that is a good fall, put it on your shoulder and go back to the dock." I put it on my shoulder, went on board the ship with it, and went aloft.
Q. Did you reeve it through all the blocks?
A. Only one; the gaff.
Q. That fall passed entirely through your hands?
A. I reeved it through one block.
177 Q. You stood there while it passed through the block?
A. Yes.
Q. You saw the whole of the fall; what was the condition of it?
A. As I seen it, it looked to be a pretty good fall; I did not examine it.
Q. Do you remember seeing a splice in that fall?
A. No, sir.

Cross-examined:

Q. How was that rope when you threw it on your shoulder?
A. Coiled up.
Q. Mr. Graham handed it to you?
A. Yes.
Q. Graham told you to go to the store-house and get a fall?
A. Yes.
Q. And you were gone a little longer than you think you ought to have been?
A. Yes.
Q. And Graham came after you?
A. Yes.
Q. And then you took one of the falls and threw it on your shoulder?

A. Yes; and went from there to the ship.
Q. You say it was coiled up?
A. Yes.
Q. And you took it aboard ship.
A. Yes.

The defendant, further to maintain the issues on its behalf, called THOMAS GERRAGHTY, who testified as follows:

Q. How old are you?
A. Twenty-five last April. I am brakesman on the Cunard dock, to hoist cargo at present; I was hoisting coal at one time—by the engine I mean. I have been brakesman hoisting cargo eleven years since last July, to the best of my knowledge. I was on the coal scow the first three years I was in the country, at a drum, and
178 off and on for three years after.
Q. What are the duties of a man stationed at the drum?
A. To know his duties and pay attention to his business.
Q. What is that to do?
A. He watches when word is passed to him to go ahead, and lower the tub; his duty is to be careful of his work.
Q. What are his duties in regard to the rope?
A. To put the turns in again, if they come out.
Q. Was it a customary thing at the drum for the turns to come out?
A. Yes.
Q. Then when it did you would stop the drum and put the turns back again?
A. Yes.
Q. Have you seen other men working the drums there do that same thing?
A. I will not be certain about that, but I have seen it on other parts of the dock.
Q. Can you say whether you yourself have done it very often?
A. Yes; I have done it very often, but could not give the exact number of times.
Q. Have you done it when hoisting coal?
A. Yes.
Q. The same scow is there now that was in 1880?
A. Yes.

Cross-examined:

Q. As I understand, it is a part of the duty of the man at the drum to watch the rope?
A. He is supposed to watch it, and if anything goes wrong, and he does not think he is capable of attending to it, he should report to the boss.
Q. Was the man at the drum capable of working the drum and putting the turns back again?
A. Yes, sir; if he made it his business to learn it.
179 Q. You were not at the drum at the night of the accident?
A. No, sir.

DEFENDANT'S COUNSEL: Q. Are you employed by the Cunard Company now?

A. Yes.

Q. How long since you left the dock?

A. Since half past nine o'clock this morning.

Q. What have you been doing down there?

A. I had been looking after damaged goods coming out of ships, when I was taken away from there.

Q. How long since you worked at the drum?

A. I can't tell positively.

Q. Suppose you were stationed at a drum, and you should find that the rope which came under your eye was all worn away, what would you do?

A. I should report to the boss if I did not think it safe; if the turns were out I would put them in again.

PLAINTIFF'S COUNSEL: Q. Supposing that the turns came out of the rope, what would you do?

A. Put them in again as best I could.

Q. If the rope was in such a condition you thought it was dangerous, would or would you not stop your engine—your drum?

A. Yes.

Q. And then report it?

A. Yes.

DEFENDANT'S COUNSEL: Q. If you found the turns out why would you stop and put the turns in again?

A. Because I thought they were just as safe as the rope was before they came out.

Q. Would the reason be that it was not as safe with the
180 turns there?

A. I don't understand you.

Q. When a rope has got turns in it is it safe, if it is a good rope, supposing the turns are out?

A. I would put them in again.

Q. Is it safe when the turns are out?

A. No.

Q. Then the reason why you put the turns in would be to make it safe?

A. Yes.

Q. Would you dip it in the water?

A. I have done it.

Q. Do you think it is a good thing?

A. Yes.

Q. Very good?

A. Yes.

Q. The very best thing that could be done?

A. There may be better ways to those who know more about it tnan I.

Q. What, in your experience, has been the effect of dipping rope in the water?

A. I believe it swells the rope.

Q. Tighten the turns so they are liable to stay in?
A. For a limited time.
Q. What is the limit?
A. I have put turns in a fall often and seen them come out again while using it.
Q. Dipping, I mean.
A. Never saw them come out while using it.
Q. How long would you use it on those occasions?
A. For hours, perhaps.
Q. Supposing the rope was unturned and the strands were worn, and then you re-turned it again and dipped it?
A. If the strands were worn I would go to the boss; I would not put the turns in it.

Defendant here rested its case.

181 The plaintiff, further to maintain the issues on his behalf, recalled JOHN S. O'BRIEN, who testified as follows:

Q. When Gerraghty left you the last time, did he tell you if the turns came out to put them in again?
A. He did, if there was a stoppage.
Q. In what?
A. Of hoisting coal.
Q. At the first stoppage he said put the turns in the rope?
A. Yes; but there was no stoppage from the time he spoke to me until the rope gave way.
Q. About how long after he told you was it before the rope broke?
A. Not very long; I could not tell you the exact time; it was not very long; a short time.

Cross-examined:

Q. I understand you mean stoppage of the hoisting?
A. Yes; of the engine; the drum, the hoisting of the coal, is all included in the same meaning.

The plaintiff, further to maintain the issues on his behalf, recalled PATRICK CAREY, who testified as follows:

Q. When did you first see Graham after you were able to go out of the house?
A. The very day the doctor let me out of the house I went down to the dock and saw him then.
Q. Did you have a conversation with him?
A. Yes, sir.
Q. Did Graham say to you on that occasion that when Smith handed him that fall he gave it back to Smith, and with the remark that it was not fit to use?
A. Yes.

Cross-examined:

Q. Who was present when Graham told you?
182 A. No one but himself and myself.
Q. Where were you standing?

A. At the edge of the dock outside.
Q. No one around?
A. There were men around, but no one near enough to hear what was said.
Q. That is all that was said?
A. That is all.

Redirect:

Q. You mean that is all that was said about this matter?
A. Yes.

Plaintiff here rested his case.

The defendant, further to maintain the issues on his behalf, recalled CHRISTOPHER GERRAGHTY, who testified as follows:

Q. When you told O'Brien that if the turns came out of the rope he should put them back again, did he say anything about stopping?
A. I told him to stop and put them in if they came out.
Q. When you put the turns in the engine was not stopped, was it?
A. One break worked.
Q. The drum simply stopped?
A. Stopped.
Q. The other drum worked?
A. Yes.
Q. He had charge of this drum to start it and to stop it?
A. Yes.

The testimony was here closed.

183 Whereupon defendant's counsel renewed his motion that the court direct a verdict for the defendant on the evidence as it now stands, on the same grounds as before.

The court denies the motion.
Defendant's counsel excepts.

Whereupon the counsel for the defendant prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

First. That in the management and operation of the hoisting apparatus Gerraghty and O'Brien were the fellow servants of the plaintiff.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid; and to such refusal the counsel for said defendant did then and there, on behalf of the said defendant, except.

And the said counsel for the defendant further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Second. That if there was negligence on the part of O'Brien, and also of Gerraghty, in the operation of the hoisting apparatus and the use of the fall which parted, and the plaintiff's injury resulted

from such negligence, or that of either of them, they being
184 his fellow servants, he cannot recover against the defendant, whether the plaintiff was guilty of contributory negligence or not.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the counsel for the said defendant did then and there, on behalf of the said defendant, except.

And the said counsel for the defendant further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Third. That O'Brien was a fellow servant of the plaintiff, and if the injury was occasioned solely by his negligence the plaintiff cannot recover.

But the said judge did not charge and instruct the jury aforesaid in the language as requested aforesaid, or otherwise than as said request is included in and covered by his charge to the jury as hereinafter given; and to such refusal the counsel for the said defendant did then and there, on behalf of said defendant, except, and did also then and there, on behalf of said defendant, except to any modification of the language of said prayer and request.

And the said counsel for the defendant further prayed and
185 requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Fourth. That Christy Gerraghty was, in the operation of the apparatus, a fellow servant of the plaintiff, and if the injury was occasioned solely by his carelessness in operating the apparatus the plaintiff cannot recover.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the counsel for the said defendant did then and there, on behalf of said defendant, except.

And the said counsel for the defendant further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Fifth. That if the fall was sufficient in itself and adequate for the work when delivered to the workmen, and the injury occurred through their negligent use of it, the plaintiff cannot recover.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the said counsel for the said defendant did then and there, on behalf of said defendant, except.

And the said counsel for the defendant further prayed and
186 requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Sixth. That the duty of the company to its employees is discharged when its agents, whose business it is to supply the apparatus, exercise due care in the purchase thereof, and keeping it in a reasonably safe condition for use.

But the said judge did not charge and instruct to jury aforesaid, in the language as requested aforesaid, or otherwise than as said re-

quest is included in and covered by his charge to the jury as hereinafter given; and to such refusal the counsel for the said defendant did then and there, on behalf of said defendant, except, and did also then and there, on behalf of said defendant, except to any modification made in said charge of the language of said prayer and request.

And the said counsel for the defendant further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Seventh. That if when Gerraghty had put the turns in the rope and wet it, it was then in an apparently good condition and fit for use, provided it was kept from becoming untwisted, and if Gerraghty directed O'Brien to keep watch of the rope, and if the turns came out again to stop and put them in again; and if thereafter the splice of the rope drew out in consequence of the turns coming out
187 again, O'Brien having failed to see that they were so coming out, and by reason of such drawing of the splice the plaintiff received his injury, such injury was the result of negligence of a fellow servant, and the plaintiff cannot recover.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the said counsel for the defendant did then and there, on behalf of said defendant, except.

And the said counsel for the defendant further prayed and requested the said judge to charge and instruct the jury aforesaid as follows, to wit:

Eighth. That if the plaintiff had been warned by Craven not to be under the hatch when a draught was coming up, and if the plaintiff was under the hatch when the tub in question fell on him, he cannot recover.

But the said judge refused to so charge and instruct the jury aforesaid as requested aforesaid, and to such refusal the said counsel for the defendant did then and there, on behalf of said defendant, except.

And the said judge did then and there charge the said jury, and his entire charge was as follows, to wit:

188 GENTLEMEN OF THE JURY: This is an action against the Cunard Steamship Company to recover damages for an injury to the plaintiff received while in the employ of the defendant, caused, as it is alleged, by the defendant's negligence in providing unsafe and defective machinery in the work upon which the plaintiff was engaged, and which defective machinery it is also claimed, directly and without the contributory negligence of the plaintiff, inflicted the injury.

It is substantially proved that Carey, the plaintiff, was, on November 3d, 1880, a longshoreman in the employ of the defendant, and was on the evening of that day set to work, with others, in the hold of the steamer Batavia, to hoist Liverpool coal from the hold to the steerage deck. The coal was shoveled into tubs in the hold, and the loaded tubs were lifted to the deck by hoisting gear operated by steam power. Carey's business was to attach the loaded

tubs to the hoisting rope, and to detach the descending empty tubs from the hoisting rope and to guide them to the shovelers. The rope which was lifting a full tub parted or broke; the tub of coal fell upon the plaintiff's leg and caused a compound comminuted fracture.

Carey was carried to the hospital, where he suffered very great pain for about five months; his life was in very great danger; he finally became a cripple for life, with a stiff knee joint and his injured leg four and a half inches shorter than the other. The extent of the injury, the extent of his suffering, and the serious and
189 permanent consequence of the fracture are not in dispute.

The first point in the case is whether Carey contributed to the injury by any negligence of his own; for if he, by his own negligence, directly contributed to the injury, although it was caused by the negligence of another, he cannot recover. If he could, by the exercise of ordinary care on his part, have avoided the injury he cannot recover.

I am requested to charge you, and do so, that if the plaintiff (that is, Carey) in his work failed to exercise the care and caution which a prudent man would exercise under the same circumstances, and but for which failure he would not have been injured, he cannot recover, notwithstanding the defendant was negligent.

The negligence which it is claimed existed on his part was the standing under the hatchway when the tubs were ascending and descending, and which it is said he had been warned not to do, because it was a dangerous place. I do not understand that the defendant's superintendent, Mr. Craven, warned the workmen not to stand in the hatchway because there was danger of falling tubs, but because there was danger of falling lumps of coal, which might be jostled from the tubs in their ascent; and the plaintiff insists that he was not under the hatchway, but on the edge of it, and just in the place where the exigences of his work compelled him to be, and in a safe place, unless it should become unsafe by the negligence of the defendant, which the caution of the plaintiff was powerless to guard against.

190 If the plaintiff is sent to work in a place where serious calamities might naturally be expected to arise, and where dangerous accidents might be naturally expected to happen, then he is called upon either not to go there or to exercise extra precaution, or else to bear unrewarded the consequences. But if he was in a safe place from any such injury unless that injury should be effected by the unforeseen and not naturally to be anticipated negligence of the defendant, then he is called upon to exercise only ordinary care. And the plaintiff claims from the testimony of Christopher Gerraghty that the plaintiff was in no fault in standing where he did, the point being that at this time of the execution of the work, when the coal had almost all been taken from the hold, as the tub descended it became necessary to guide it to the workmen who were shoveling in the wing of the hold, and that Carey reached out his hand or stepped forward under the hatchway, took hold of the tub by the edge, and guided it to or attempted to guide it to

where the shovelers were at work; that is, in the wing of the ship's hold in which Carey originally stood. In that part of the case the plaintiff calls your attention to the testimony of Gerraghty when he says that it was necessary for Carey to step out under the hatch to catch the empty tub, and that if he had waited until the loaded tub went up perhaps the empty tub would have landed, and he could not get it where he wanted it.

I do not think that the circumstances of this case call upon me to dwell longer upon upon this point.

191 The next and important point in the case is whether the injury was caused by the negligence of the defendant in providing an unsafe rope or in using the rope after it had become manifestly unsafe, by its agents, to whom the duty of selecting safe appliances and controlling the use of and rejecting unsafe ones had been intrusted.

As a general rule, the law does not impose upon employers a liability for injuries to servants which happen by the negligence of co-servants engaged in the common employment in which the injured party is engaged, although the negligent servant may be of a grade superior to that of the injured person, or his foreman in the common business.

But the law also requires that employers shall personally exercise ordinary care in regard to the safety of the machinery and tackle which the workmen must use, and are responsible when an injury happens by the use of unsafe machinery which the employer knew, or by the exercise of ordinary care would have known, was unsafe and the employee did not know of the defect from his inability to examine or know about the machinery.

The employer is not an insurer or guarantor of safety; he is required to exercise the care which prudence requires in providing the servants with machinery reasonably and adequately safe for use by the latter. And the employer is not bound to furnish the safest or best apparatus for the use of his workmen, nor apparatus of any particular character, nor is he obliged to maintain it up to its maximum strength. But, as I told you, he is obliged to

192 exercise the care which prudence requires in providing the servant with machinery reasonably and adequately safe for use by the latter; and when the employer is a corporation, which acts through agents, it is responsible for the negligence of those agents, who are intrusted with the duty of selecting the machinery and of exercising, after it is selected, a controlling and governing supervision and rejection when the selected machinery becomes unsafe, and they know, or ought, in the exercise of ordinary care to know, of its unsafety.

For example, in the case at bar it is manifest that Mr. Craven, who says that he was the manager of the defendant's coal business at that dock, with the power or hiring and discharging men, and with the duty of seeing that the falls and appliances of this character upon the dock were right, is an agent of the character which I have described.

To come nearer to the facts in the case, it is admitted that Carey

did not know and could not have known of any defect in the rope from his station and his employment.

(I have written the following before I heard the argument of the learned counsel for the plaintiff, and I think I will read it as I wrote it originally, although it is trenching somewhat upon the positions which he took in his argument.)

It may, furthermore, in my opinion, be considered as a fact that the rope was a spliced rope, and that the injury happened by the untwisting and drawing apart of the portion of the rope which was spliced. In my opinion, gentlemen, it is so manifestly the
193 preponderance of the evidence that this was a spliced rope, and that the injury happened by the parting of the portion which was spliced, that I do not think it is desirable to balance the testimony before you upon that point.

The plaintiff takes two positions: First, that the rope was unsafe when selected from the store-room; secondly, that if safe when selected, it became thereafter unsafe, and was carelessly permitted by Gerraghty to remain in a dangerous position.

And upon the first point: The plaintiff says that a spliced rope in being drawn through blocks will naturally chafe, and will also naturally untwist; that this rope had been used in a fall twice after having been spliced; that it became chafed so as to obvious to O'Brien in an hour after he commenced to use it, and that Craven knew or saw that it was a spliced rope. And the plaintiff further says that, from its condition when first examined by O'Brien (that is, at the time which he calls eight o'clock, or supposed it was after eight o'clock—whenever it was) it must have been defective to the eye of a person who looked at it with ordinary care when it was selected for the night's work, or that otherwise it would not have deteriorated so much.

The fact upon which the plaintiff relies is that it did pull apart about half-past ten o'clock; that O'Brien says it was chafed about eight o'clock, and that confessedly the turns were loosened when O'Brien called Gerraghty, whenever that was—eight or nine
194 o'clock, as the case may be, and that therefore it must have been in a visibly unsound condition at five or six o'clock.

The defendant relies, on the other hand, upon the testimony of the storekeeper, of the rigger, and of Craven, that the rope was a good one when selected; and the defendant says that the strength of the testimony is that the rope was a good rope, and would continue to have been if the turns were permitted not to have become untwisted.

In my view of this case, gentlemen, the important point in the case is the one to which I shall now call your attention. I do not presume to decide upon this question of fact which I have just submitted to your consideration. But I conceive that the important feature in the case is the one to which I am now coming, and that is: That the plaintiff says that if the rope was a good rope in the first place it soon became unsafe, and that its unsafety was known, or ought to have been known, by the agent, Gerraghty, to whom, in the absence of Craven, was intrusted the governing and controlling supervising and rejection of unsafe machinery.

Now, in the first place, in examining this point, it is necessary to ascertain what Gerraghty's authority was.

Obviously, Craven was such an agent as I have described, who had controlling authority in regard to the tackle and machinery upon the dock, and if he had been present, and had been notified of defects, and had been guilty of negligence, the liability of the company would have been plain. But it is said by the defendant
195 that Gerraghty was a mere foreman of men, and had no more responsibility in respect to the tackle than O'Brien. It is substantially manifest that Craven was absent the latter part of the evening; whether he was absent when this matter was first called to Gerraghty's attention, is, perhaps, a matter of some doubt. If the matter was first called to Gerraghty's attention at eight o'clock, then Craven was there; if the matter was called to his attention at nine o'clock or thereafter, then Craven was not there, always provided that Craven was right in the point that he went away at nine o'clock, and not earlier.

The only information that we have as to Gerraghty's powers in the absence of Craven, comes from Craven and from Gerraghty himself. In Craven's presence Gerraghty is a mere foreman, with no power of discharging men or rejecting machinery. That is obvious. But what is he in Craven's absence? Craven says: "In the absence of myself and Storey, Gerraghty would have the right to hire and discharge men and look after the falls and things on the dock." Gerraghty says: "If I had thought it was necessary to put in a new rope I should have done it." That is the only testimony upon the subject, and therefore, gentlemen, there is no need of your balancing testimony, but simply to find out, from what these two persons say, what the authority of Gerraghty was.

Well, now assuming, to use a terse expression, that he "stood in the shoes" of Craven, and that Craven was absent, let us go forward and find out what his conduct was—negligent or otherwise.
196 If, gentlemen, he was no more than he was when Craven was present, then his knowledge is not the knowledge of the company.

The plaintiff says that the admitted danger to spliced ropes is that of untwisting, and that caution is to be used not to have them untwist. Now, gentlemen, I will turn your attention to the testimony of three persons who were present upon the scow, and who knew, or are supposed to know, in regard to this rope, viz., O'Brien, Redmond, and Garraghty.

O'Brien's testimony:

"I told Gerraghty that the rope looked bad (this was, as he said, about eight o'clock); looked as though it would not last. He told me to go ahead. He came down an hour after, and I told him that it looked worse; that I was afraid it might carry away. Whether he steeped the rope—that is, dipped the bight of the rope in water—the first time I spoke, or the last time, I can't remember. A short time after the last talk the rope broke."

Now we turn to Joseph Redmond's testimony:

"Gerraghty came on the scow a little after eight o'clock. Before he came down my attention had been called to the rope. The turns were coming out of it; nothing else the matter at that time. O'Brien told Gerraghty that the fall was not fit for business, or something to that effect. Gerraghty told O'Brien to look out for the fall, and, if it wanted turns, to put them in. My attention wasn't called
197 to the fall again. It was about two hours before the accident."

Now we will see what Gerraghty says:

"I went on the scow that night about nine and a half o'clock; saw O'Brien, Redmond, and Higgins. O'Brien told me: 'Look at that fall.' The part of the fall to which he referred was not then in the scow. He told me that the fall did not look very well; the turns were out of it. I saw nothing else the matter. I took the fall off the drum; I put the turns in it, and wet it to make the turns harder. I put the fall on the drum and told O'Brien to look out for the fall, and if the turns got out to put them in. O'Brien spoke to me about the rope but once. After I left the scow after the talk with O'Brien I did not go back again, that I remember. I was on the vessel. I was called to the scow to look at the fall. I think O'Brien first spoke to me. The first that was said was to look at that fall; I looked at it."

Now, gentlemen, the plaintiff says it is manifest, from the testimony of O'Brien and Redmond, that the rope was in bad condition, and was in danger of untwisting, and that Gerraghty did not appreciate the danger, and was satisfied with simply twisting the turns, replacing the rope, and going away; that the calamity which followed showed that the rope was in a dangerous condition by reason of untwisting or liability to untwist; and, next, that if Gerraghty's testimony is true, and he left the rope, simply saying to O'Brien
198 if it become untwisted put the turns in, and did not return to watch it, and the calamity happened, that is Gerraghty's neglect; that the sphere of Gerraghty's duties that evening was a narrow one; that he had only to occupy himself on the scow and on the steerage deck and in the hold of the steamer; that this was not the case of an agent who is compelled to go away to a distance and to leave the work in charge of some one else; that the important duty of the hour was to see that the rope did not untwist, and that when he went away upon the vessel and did not return, content to entrust the matter to an ordinary workman, and the calamity happened through the workman's neglect, it is the fault of Gerraghty, because he had no business that night to abandon the oversight of the rope in the condition in which it was when he saw it.

The defendant says, on the other hand, that untwisting of spliced ropes is a common occurrence in the course of this business; that there is no danger from untwisting if precautions are taken to retwist, and that when Gerraghty told O'Brien to look out for the rope

and retwist it, he had entrusted a simple matter to O'Brien, which did not demand the exercise of much thought, and that Gerraghty had then done all that was his duty to do.

These are the two theories or sets of arguments which the counsel present to you, and if you think that the rope was in a good condition when it went upon the fall and thereafter became in a bad condition, which Gerraghty, then being in the shoes of
199 Craven, and, in the absence of Craven, knew, and which he ought to have attended to himself and which he did not attend to, and the accident happened in consequence of his negligence, then the plaintiff has made out his case.

If, on the other hand, you think that Gerraghty did all that was his duty to do, and that this was a simple matter and a matter which required no care and which it was a safe thing to entrust to the hands of O'Brien, if he did entrust it to his hands, then another conclusion will naturally follow—that is, that he was not guilty of negligence.

Something was said in regard to what conclusion you were to draw from the fact that the damaged rope is not in court. After suggesting to you that it is a circumstance which you are permitted to look at, I wish to say also that, in view of the fact that no suit was brought or claim made for more than a year after the accident, it is a circumstance from which, on the other hand, no injurious conclusion against the company may naturally be drawn.

Now, gentlemen, in regard to the question of damages, if you come to that, there is no rule that I can lay down to you—that is, no exact rule—that can be laid down to you upon the question of damages. The plaintiff gives me a good one. In estimating the damages sustained by the plaintiff, the jury may take in consideration the pain and suffering, physical and mental, which the evidence shows he has suffered as a consequence of his injuries; also the character of the injury and its permanency, and its effect
200 upon the plaintiff's capacity to labor and earn money in the future. All I can say to you, gentlemen, upon the matter of damages, if you come to that question, is that you are called upon to deal justly, and to give just *just* damages. It would not be fair for you to give damages in view of this consideration; what would I—what would you, take to go through the suffering, the pain, the chances of death, the permanent injury, which this man has gone through? Why, gentlemen, the fortunes of the richest man of you, you would not take in exchange for the probabilities of death which this man went through. You know that you would not dwell upon the subject a moment. Therefore you are to look at the matter calmly and reasonably, and give him what you consider just damages; but not extravagant, not vindictive, not exorbitant, damages; but as jurors, to whom the duty of dealing between these parties is entrusted, all I can say to you is, deal justly between them.

Thereupon counsel for the said defendant did then and there except to that portion of the charge of the judge to the jury as follows, to wit:

"I do not understand that the defendant's superintendent, Mr.

Craven, warned the workmen not to stand in the hatchway because there was danger of falling tubs, but because there was danger of falling lumps of coal which might be jostled from the tubs in their ascent;" and said counsel then and there, in connection with said portion of said charge, requested the judge to charge the jury aforesaid as follows, to wit:

201 That it was immaterial what the danger was, if the direction was that they were not to stand under the hatch.

But the judge refused to charge the jury as requested aforesaid; to which refusal counsel for the defendant did then and there, on behalf of said defendant, except.

Counsel for the defendant also excepted to that portion of the charge of the judge to the jury aforesaid as follows, to wit:

"But if he was in a safe place from any such injury, unless that injury should be effected by the unforeseen and not naturally to be anticipated negligence of defendant, then he is called upon to exercise only ordinary care."

Counsel for the defendant also excepted to the portion of the charge of the judge to the jury as follows, to wit:

That the employer "is obliged to exercise the care which prudunce requires in providing the servant with machinery reasonably and adequately safe for use by the latter," the exception having reference solely to the word "adequately" in said portion of said charge.

Counsel for the defendant also excepted to the portion of the charge wherein the judge instructed the jury that "Craven was an agent of the defendant, entrusted with the duty of selecting the machinery, and of exercising, after it is selected, a controlling and governing supervision, and rejection when the selected ma-

202 chinery becomes unsafe, and knew, or ought, in the exercise of ordinary care, to know of its unsafety."

Counsel for defendant further requested and prayed the judge to charge the jury aforesaid as follows, to wit:

That the jury cannot draw the conclusion that from the appearance of the rope when O'Brien noticed it it was insecure at the time when it was furnished, and that the plaintiff's claim in that respect is unfounded.

But the judge refused to so charge the jury aforesaid as requested aforesaid; to which refusal the counsel for the defendant did then and there, on behalf of the said defendant, except.

Counsel for the defendant also excepted to that portion of the charge wherein the judge instructed the jury as follows, to wit:

"That is the only testimony upon the subject, and therefore, gentlemen, there is no need of your balancing testimony, but simply to find out, from what these two persons (Craven and Gerraghty) say, what the authority of Gerraghty was."

Counsel for the defendant also excepted to the portion of the charge of the judge to the jury as follows, to wit:

203 "If you think that the rope was in a good condition when it went upon the fall and thereafter became in a bad condition, which Gerraghty, then being in the shoes of Craven, and in the

absence of Craven knew, and which he ought to have attended to himself, and which he did not attend to, and the accident happened in consequence of his negligence, then the plaintiff has made out his case."

Counsel for the defendant also excepted to the portion of the charge of the judge to the jury as follows, to wit:

"If, on the other hand, you think that Gerraghty did all that was his duty to do, and that this was a simple matter which required no care and which it was a safe thing to entrust to the hands of O'Brien, if he did entrust it to his hands, then another conclusion will naturally follow—that is, that he was not guilty of negligence."

And the said judge, under the charge, and with the directions aforesaid, *inter alia*, left the aforesaid issues and the evidence so given on the trial thereof as aforesaid to the said jury, and the said jury then and there gave their verdict for the said plaintiff for fifteen thousand dollars damages.

And inasmuch as none of the said exceptions so offered and made to the opinion and decision of the said judge do appear upon the record of the said trial, therefore, on the prayer of the said defendants, by their counsel, the said judge hath to this bill of ex-
204 ceptions put his seal, according to the statute in such case made and provided, this twenty-ninth day of December, in the year one thousand eight hundred and eighty-two.

N. SHIPMAN, *Judge.* [L. S.]

205 U. S. Circuit Court, Southern District of New York.

THE CUNARD STEAMSHIP COMPANY (LIMITED), Plaintiff in Error,
vs.
PATRICK CAREY, Defendant in Error.

Know all men by these presents that we, Ira Bursley and George C. Magoun, are held and firmly bound unto Patrick Carey in the sum of twenty thousand dollars, lawful money of the United States of America, to be paid to the said Patrick Carey, his executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the first day of February, one thousand eight hundred and eighty-three.

Whereas judgment hath heretofore, on the twenty-ninth
206 day of January, in the year one thousand eight hundred and eighty-three, been rendered by the circuit court of the United States in a certain suit therein pending, wherein Patrick Carey was plaintiff and The Cunard Steamship Company (Limited) was defendant, in favor of said plaintiff and against said defendant, for the sum of fifteen thousand two hundred and eighty-five $\frac{15}{100}$ dollars, and the said defendant has prosecuted a writ of error to the Supreme Court of the United States to reverse the said judgment:

Now, therefore, the condition of this obligation is such that if the above-named defendant shall prosecute its said writ of error to effect,

and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; other- the same shall be and remain in full force and virtue.

IRA BURSLEY. [SEAL.]
GEO. C. MAGOUN. [SEAL.]

Sealed and delivered in the presence of—
[L. S.] S. G. LEATHEM.

207 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Ira Bursley, one of the subscribers to the foregoing bond, being duly sworn, says: That he is a resident of the city of New York, county of New York and State of New York, and a freeholder within this State, and is worth the sum of forty thousand dollars, over and above all his debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

IRA BURSLEY.

Sworn to before me, this first day of February, 1883, and resworn, after alteration, on the 7th day of Feb'y, 1883.

[L. S.] S. G. LEATHEM,
(113) *Notary Public, New York Co.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George C. Magoun, one of the subscribers to the foregoing bond, being duly sworn, says: That he is a resident of the city of
208 New York, county of New York and State of New York, and a freeholder within this State, and is worth the sum of forty thousand dollars, over and above all his debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

GEO. C. MAGOUN.

Sworn to before me, this 1st day of February, 1883, and resworn, after alteration, on the 7th day of February, 1883. S. G. L.

[L. S.] S. G. LEATHEM,
(113) *Notary Public, New York Co.*

STATE OF NEW YORK, }
Southern District of New York, } *ss:*

On this first day of February, 1883, before me personally came Ira Bursley, and subsequently, after alteration of the bond, on the seventh day of Feb'y, 1883, and George C. Magoun, to me known and known to me to be the same individuals described in and who executed the foregoing bond, and severally acknowledged
209 that they executed the same for the uses and purposes therein mentioned. S. G. L.

[L. S.] S. G. LEATHEM,
(113) *Notary Public, New York Co.*

The foregoing bond is hereby approved as to form, amount, and sufficiency of the sureties, said sureties having justified.

Dated New York, February 7th, 1883.

HERMAN H. SHOOK,
Att'y for Def't in Error.

The foregoing bond is hereby approved as to form, amount, and sufficiency of the sureties.

Feb'y 8, 1883.

WM. J. WALLACE.

Endorsed: U. S. circuit court, southern district of New York. Ira Bursley and George C. Magoun to Patrick Carey. Bond. Owen & Gray, attorneys & counsellors, 71 Wall street, N. Y. city. U. S. circuit court. Filed Feb'y 8, 1883. Joseph M. Deuel, clerk.

210 UNITED STATES OF AMERICA, *ss:*

To Patrick Carey:

You are hereby cited and admonished to be and apperr at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to the writ of error filed in the clerk's office of the circuit court of the United States for the second circuit and the southern district of New York, wherein The Cunard Steamship Company (Limited) is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable William J. Wallace, judge of the circuit court of the United States for the southern district of New York, and one of the justices of said circuit court, this 8th day of February, in the year of our Lord one thousand eight hundred and eighty-three and of the Independence of the United States the one hundred and seventh.

WM. J. WALLACE.

211 STATE OF NEW YORK, *Southern District of New York,* } *ss:*

——— ———, being duly sworn, deposes and says: That on the — day of ———, 1883, at the city of New York, he served the foregoing citation on H. H. Shook, the attorney for the defendant in error, by showing him the foregoing citation and delivering to and leaving with him a copy thereof.

——— ———.

Sworn to before me, this — day of ———, 1883.

——— ———.

212 [Endorsed:] (In pencil: E. & A. A. 398.) U. S. circuit court, southern district of New York. The Cunard Steam-

ship Company (Limited), plaintiff in error, *vs.* Patrick Carey, defendant in error. Citation. Owen & Gray, attorneys for pl'ff in error, 71 Wall street, N. Y. city. Due service of the within citation is hereby admitted. Feb'y 8th, 1883. Herman H. Shook, att'y for def't in error. U. S. circuit court. Filed Feb. 8, 1883. Joseph M. Deuel, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 266. The Cunard Steamship Company (Limited), plaintiff in error, *vs.* Patrick Carey. Filed 28th August, 1883.

Supreme Court of the United States.

THE CUNARD STEAMSHIP COMPANY, Limited, *Plaintiff in Error,* *against* PATRICK CAREY, *Defendant in Error.*	*October Term*, 1885. *Number* 266.

Brief of Plaintiff in Error.

This is a writ of error brought by the defendant below, to review a judgment of the Circuit Court of the United States for the Southern District of New York, entered upon the verdict of a jury in favor of the plaintiff. The action was brought in the Superior Court of the City of New York to recover damages for personal injuries received by the plaintiff through the alleged neglect of the defendant.

It was, upon defendant's petition, duly removed to the Circuit Court, where a trial was had before the Honorable Nathaniel Shipman and a jury, which resulted in a verdict for the plaintiff.

Pleadings.

The complaint alleged that on November 3d, 1880, the plaintiff was engaged in defendant's service, and was working in the hold of its steamship *Batavia*, hooking coal-tubs to the hoisting apparatus; that the defendant provided and used unsafe and defective hoisting apparatus, of which it had notice; and that by reason of such defectiveness the rope forming part of the apparatus broke, whereby the coal-tub attached thereto fell upon the plaintiff, without any fault on his part (Complaint, fols. 7 and 8).

The answer denied the charges of fault alleged against the defendant, and also denied that the plaintiff was free from neglect (Answer, fol. 12).

Material Facts.

Patrick Carey had been in the employ of the Cunard Steamship Company for two years as longshoreman, and on the evening of November 3d, 1880, was sent, with others, into the hold of the steamship *Batavia* to assist in shifting coal from that place to the steerage deck above. The particular work assigned to him was that of hooking full tubs to the hoisting apparatus, for the purpose of having them raised, and of unhooking empty tubs when they had descended; *and his duty required him to be stationed at the edge of the hatch*, on the in shore side of the ship, or that nearest the dock, where all of the coal was which the men were engaged in shifting.

Two falls were in use on the hoisting apparatus, each operating a tub, one of which ascended while the other descended, *and a man named Henretty was stationed in the hold, on the opposite side of the hatch to Carey, whose duties were similar to those of Carey. Each*

attended to the tub ascending and descending on his side of the hatch.

Each fall was rigged to a block on a gaff or boom over the hatch, and ran from thence through a block or davit at the side of the ship, from thence through a block on the end of a scow alongside the ship, and from thence to a drum inside the house on the scow. The drums were turned by an engine on the scow, and the drum which operated the particular fall in question was in charge of a man named O'Brien. The other drum was in charge of a man named Higgins, and the engine on the scow was in charge of a man named Redmond.

The superintendent of the dock, having general authority over all matters connected therewith, was named Storey. Under him was a foreman stevedore, Craven, who had charge of loading and unloading the ships, who hired and discharged all the longshoremen, set them to work, and exercised supervision over all things connected with that work. Under Craven were bosses of different gangs, among whom was Christopher Gerraghty, the boss of the coal gang, who had charge of the men, to see that they did their duty. The care and repair of the apparatus used by the men were in charge of the storekeeper, David Smith. The placing of the apparatus in position for work was in charge of the rigger, Graham.

On the evening in question Craven directed Graham to rig the falls for the purpose of hoisting out the coal. He went to the store-house and selected a fall, *i. e.*, a rope, from among others; told Short, another rigger, to place it in position and superintended that job. It was a spliced rope, such as are commonly used for that purpose.

Craven sent ten men into the hold to get out the coal, and stationed one on each side of the hatch in the hold, and one on each side of the hatch on the steerage deck. The men commenced work between six and seven o'clock and worked until about half-past ten. At that time Carey had hooked his tub, loaded with coal, to the fall, and it had ascended nearly to the steerage deck. *He then*

stepped out from under the deck at the edge of the hatch, and stepped across the hatch directly under the loaded tub, in order to reach the empty tub descending on the opposite side of the hatch. While in this position the full tub, which he had sent up, fell upon him.

Craven had remained on the dock attending to his duties until about nine o'clock, when he went home, leaving Gerraghty in charge of the men. Down to the time Craven left, no notice had been given to him by any one as to the condition of any of the apparatus. Sometime after eight o'clock, O'Brien, before whom a considerable portion of the rope was constantly in sight, first noticed that something was the matter with the rope which he was operating. It was his duty to watch the rope, to work it carefully, to take care of it if the turns or twists came out of it, viz., to retwist it, and to report its condition if unfit for work for any reason. He did nothing, neither stopped his drum, attended to the rope himself, nor reported its condition, until Gerraghty, who had been notified by some one concerning the rope, came down upon the scow some time afterwards. O'Brien then spoke to Gerraghty concerning the rope. Gerraghty took the rope off the drum and put back the turns or twists which had come out, dipped the rope in the water and put it back on the drum, and when he left the scow directed O'Brien to look out for the rope, and, if the turns came out again, to take it off and put them in. O'Brien continued to operate the rope, and saw that it was getting worse, but did nothing himself to correct its condition; he neither stopped the drum nor attended to the rope, nor gave notice. O'Brien says that he spoke to Gerraghty a second time about the condition of the rope, but does not say what was done or said by Gerraghty at that time. He does not remember whether Gerraghty's action with regard to the rope was on the first or second occasion of his speaking to him, except that he does say that Gerraghty directed him to put the turns in the rope if they came out again. This, however, O'Brien failed to do. He continued to hoist with the rope, and sometime afterwards the splice drew,

by reason of the rope untwisting, and the disaster followed.

It is customary to use spliced ropes for the purpose of hoisting, and the splice in and of itself constitutes no defect, and in no manner weakens the rope for use. *It is also usual for the turns or twists to come out of the rope while being operated single, by reason of the motion of the drum or the revolving of the articles hoisted, which necessitates watchfulness and care on the part of those operating the falls to see that the turns do not come out to the detriment of the rope.* The rope in question was good and sufficient for the purpose when the work commenced that evening.

The plaintiff had been directed not to go under the open hatch when a load was ascending, and had also been repeatedly warned against doing the same thing.

The tub fell by reason of the drawing of the splice, caused by the rope untwisting.

The Court refused to direct a verdict for the defendant, but left the jury to decide upon uncontradicted testimony, *first*, whether or not the plaintiff was guilty of contributory negligence; and, *second*, whether or not Gerraghty was a fellow workman with the plaintiff, or the representative of the defendant, for whose negligence the defendant would be liable.

The Court further charged the jury that the rope was a spliced rope; that the injury occurred by the untwisting and drawing apart of the portion that was spliced (fols. 192-3); that the important duty of the hour was to see that the rope did not untwist (fol. 198); and that, if the rope was in good condition when it went upon the fall, and thereafter became in bad condition, which Gerraghty knew, and should have attended to himself and did not, and the accident happened in consequence, the defendant was liable (fols. 198-9).

Errors Assigned.

I.—The Court refused to direct a verdict for the defendant when it should have directed such verdict on the grounds:

First.—That the plaintiff was guilty of negligence contributing to his injury.

Second.—That the evidence failed to establish negligence on the part of the defendant; and,

Third.—That the injury was occasioned through the negligence of a fellow servant (fols. 95, 183).

II.—The Court refused to charge that in the management and operation of the hoisting apparatus, Gerraghty and O'Brien were the fellow servants of the plaintiff, when it should so have charged (fol. 183).

III.—The Court refused to charge that if there was negligence on the part of O'Brien and also of Gerraghty in the operation of the hoisting apparatus and the use of the fall which parted, and the plaintiff's injury resulted from such negligence, or that of either of them, they being his fellow servants, he cannot recover against the defendant whether the plaintiff was guilty of contributory negligence or not, when the Court should so have charged (fols. 183–4).

IV.—The Court refused to charge that O'Brien was a fellow servant of the plaintiff, and if the injury was occasioned solely by his negligence, the plaintiff cannot recover, when the Court should so have charged (fol. 184).

V.—The Court refused to charge that Cristy Gerraghty was, in the operation of the apparatus, a fellow servant of the plaintiff, and if the injury was occasioned solely by his carelessness in operating the apparatus, the plaintiff cannot recover, when the Court should so have charged (fol. 185).

VI.—The Court refused to charge that if the fall was sufficient in itself, and adequate for the work when delivered to the workmen, and the injury occurred through their negligent use of it, the plaintiff cannot recover, when the Court should so have charged (fol. 185).

VII.—The Court refused to charge that the duty of the company to its employees is discharged when its agents, whose business it is to supply the apparatus, exercise due care in the purchase thereof, and keeping it in a generally safe condition for use, when the Court should so have charged (fol. 186).

VIII.—The Court refused to charge that if when Gerraghty had put the turns in the rope and wet it, it was then in an apparently good condition and fit for use, provided it was kept from becoming untwisted; and if Gerraghty directed O'Brien to keep watch of the rope, and if the turns came out again, to stop and put them in, and if thereafter the splice of the rope drew out in consequence of the turns coming out again, O'Brien having failed to see that they were so coming out, and by reason of the drawing of the splice the plaintiff received his injury, such injury was the result of the negligence of a fellow servant, and the plaintiff cannot recover, when the Court should so have charged (fols. 186-7).

IX.—The Court refused to charge that if the plaintiff had been warned by Craven not to be under the hatch when a draft was coming up, and if the plaintiff was under the hatch when the tub in question fell on him, he cannot recover, when the Court should so have charged (fol. 187).

X.—The Court charged: "I do not understand that the defendant's superintendent, Mr. Craven, warned the workmen not to stand under the hatchway because there was danger of falling tubs, but because there was

danger of falling lumps of coal which might be jostled from the tubs in their assent," when the Court should have charged that it was immaterial what the danger was if the direction was that they were not to stand under the hatch, which the Court refused to charge (fols. 189, 200–1).

XI.—The Court charged that if the plaintiff was in a safe place from any such injury unless that injury should be effected by the unforeseen and not naturally to be anticipated neglect of the defendant, then he is called upon to exercise only ordinary care, when the Court should not so have charged (fols. 190, 201).

XII.—The Court charged that Craven was an agent of the defendant and intrusted with the duties of selecting machinery, and of exercising after its selection a controlling and governing supervision, and rejection when the selected material becomes unsafe, and when he knew, or ought in the exercise of ordinary care to have known, of its unsafety, when the Court should not so have charged (fols. 192, 201).

XIII.—The Court refused to charge that the jury cannot draw the conclusion that from the appearance of the rope when O'Brien noticed it, it was insecure at the time when it was furnished, and that the plaintiff's claim in that respect is unfounded, when the Court should so have charged (fol. 202).

XIV.—The Court charged: "That is the only testi-
" mony upon the subject; therefore, gentlemen, there is
" no use of your balancing testimony, but simply to find
" out from what these two persons, Craven and Ger-
" raghty, say, what the authority of Gerraghty was;"
when the Court should not so have charged (fols. 195, 202).

XV.—The Court charged: "If you think that the

" rope was in a good condition when it went upon the " fall, and thereafter became in a bad condition, which " Gerraghty, then being in the shoes of Craven, and in " the absence of Craven, knew, and which he ought to " have attended to himself, and which he did not attend " to, and the accident happened in consequence of his " negligence, then the plaintiff has made out his case;" when the Court should not so have charged (fols. 198-9, 203).

XVI.—The Court charged: " If, on the other hand, " you think Gerraghty did all that it was his duty to do, " and that this was a simple matter, which required no " care, and which it was a safe thing to entrust to the " hands of O'Brien, if he did entrust it to his hands, then " another conclusion naturally follows; that is, that he " was not guilty of negligence;" when the Court should not so have charged (fols. 199, 203).

XVII.—The Court admitted testimony of conversations between O'Brien and Gerraghty as to the rope, when it should have excluded them (fol. 74).

POINTS.

First Point.—It was the duty of the Court to direct the jury to return a verdict for the defendant on the ground that the plaintiff was guilty of contributory negligence.

I.—The law is well settled that if a party has by his own acts contributed to his injury he cannot recover.

(*a*). While experience proves that men will often foolishly risk their lives to save a few minutes time, or avoid a little additional trouble, the law in the interest of public policy imposes the burden of such folly upon him who takes the risk. It declares that in the performance of business undertakings men shall conduct themselves with care and prudence, and that for a violation of this duty they alone shall suffer. The extent of this duty depends upon circumstances, but the entire absence of care is always negligence. This Court defines negligence as

> "The failure to do what a reasonable and pru-
> "dent person would ordinarily have done under
> "the circumstances, or doing what such a person
> "under ordinary circumstances would not have
> "done."
>
> *Railroad Company against Jones*, 95 *U. S.* 439.

Prudence is, therefore, imposed as a continual duty upon men in order to avoid the consequences of their own acts.

(*b*). The degree of care necessary to be exercised varies with the undertaking. A service which is openly free from risk requires less care and caution on the part of him who renders it, than a service which is dangerous in its nature. So also the duty of observing care and caution increases with the knowledge of the necessity for their observance, for with the warning of danger arises the duty of prudence and self protection. The previous knowledge of a dangerous situation, from which a person of ordinary intelligence and prudence might reasonably apprehend injury, imposes upon him the duty of greater care and caution in approaching it; and where the danger is manifest, and the party is in addition warned against it, this duty is still more stringent.

(*c*). The question to be determined in these cases is not, did the party injured by his own negligence cause

the injury, but could he, by the exercise of care necessary under the circumstances, have avoided the injury. In other words, did his act contribute? If his act is such as a man of ordinary intelligence could reasonably anticipate might result in his injury, then he has violated the duty imposed upon him. It is not necessary that a party actually did apprehend injury as the result of his own act, but that he should have done so in the exercise of an ordinary and reasonable intelligence.

We quote again from the case of *Railroad Company against Jones, supra:*

> " The liability of the company is conditioned
> " upon the exercise of reasonable and proper
> " care and caution on the plaintiff's part. * * *
> " Where the plaintiff himself so far contributed
> " to the misfortune by his own negligence or want
> " of ordinary care and caution, that but for such
> " negligence or want of care and caution on his
> " part the misfortune would not have happened,
> " he is not entitled to recover. * * * Such is
> " the rule of the civil and common law. A plain-
> " tiff in such a case is entitled to no relief."

II.—That the plaintiff was guilty of a breach of a legal duty which contributed to his injury should have been decided as a matter of law by the Court.

It may be conceded generally that the question of negligence should be left to the determination of the jury, who are to decide between witnesses when they are in conflict, and to draw their own inferences from undisputed facts; still, where there is no conflict in the testimony, and where no inference, save that of negligence can properly be drawn, then there is no question to be submitted to the jury. It is for the Court to apply the test whether or not the circumstances, taken in connection with the occurrence, indicate or tend to establish some cause for the accident consistent with the exercise of proper prudence and care on the plain-

tiff's part. If they do not, then the inference of plaintiff's negligence is the only one left to be drawn.

The case should not be submitted to the jury because a mere scintilla of evidence appears, nor should the jury be permitted arbitrarily to draw forced inferences from the testimony; but before the questions are left to them it should appear that there is evidence upon which a verdict can properly be founded, and that the inferences can justifiably be drawn. Otherwise the Court should direct a verdict.

Schofield v. *Chicago Milwaukee and St. Paul R. R. Co.*, 114 U. S., 615-619.

"It is the duty of the Court in its relation to "the jury to protect parties from unjust verdicts "arising from ignorance of the rules of law and "of evidence; from impulses of passion or preju- "dice, or from any other violation of lawful rights "in the conduct of a trial. * * * "In the discharge of this duty it is the province "of the Court, either before or after the verdict, to "decide whether the plaintiff has given evidence "sufficient to support or justify a verdict in its "favor." The case must be such as that the jury might justifiably have found a verdict.

Pleasants v. *Fant*, 22 Wall., 116-120.
Randall v. *Baltimore and Ohio R. R. Co.*, 109 U. S., 478.

The principles thus established relate to every question in the case; not only to the acts of the defendant, but also to those of the plaintiff.

III.—The undisputed testimony establishes that the plaintiff was guilty of a want of ordinary care and caution, but for which he would not have been injured.

A. The position under the open hatch during the operation of the tubs was manifestly dangerous. The men were working at night; the hatch was pretty well filled up by the tubs, as they were in constant motion

(fol. 44), one ascending and the other descending, and naturally would jostle against each other; they might strike the bulkhead (Graham, fol. 163); their contents might fall out (Craven, fol. 100), or they might strike against each other (Gerraghty, fols. 134–143). There was risk of the men above not guiding them properly; of the men at the winch not lowering or hoisting them properly. All these circumstances made the place one attended with risk to be guarded against by those in the hold. The plaintiff had been engaged in the same work often before (Plaintiff, fol. 45), and therefore knew that the position under the tubs was manifestly one attended with risk. As was said in *Railroad Company* v. *Jones*, *supra:* "It was obviously a place of peril, especially in case of (accident) collision."

Prudence, therefore, required that the plaintiff, to whom these risks were apparent, should not subject himself to injury from them. As in the case referred to, so here, as far as it appears from the evidence, no one was hurt except him who took the risk of his own act.

B. If the servant, in the peformance of a duty attended with risk, omits to adopt the usual and proper precautions recommended or required by the master or the master's representative, which will lessen or avert the risks to be encountered, his want of care cannot be excused by a pretended reliance on the prudence and judgment in other respects of his superior, whose wise suggestions he disregards. Much less can the servant be excused from the result of his own act, if that act is committed in direct disobedience of a positive instruction from the master.

The plaintiff was injured while he was acting in violation of express instructions given to him for his own protection. If he had obeyed them he would not have been injured. His disobedience was contributory negligence.

(*a*). The plaintiff had been expressly directed "Not to be

standing underneath the hatch, with a draft going up." Craven so testifies (fol. 100), and the plaintiff does not deny it.

(1). The tendency of the Courts of late has been towards holding masters to a more stringent exercise of care and watchfulness in furnishing and maintaining in good order the machinery of the service. This has been the result of the desire of the Courts to insure as far as possible the safety of servants whose duty it is to use the varied machinery of our modern times. The same influence leads them to be stringent in insisting that the master shall make due and proper regulations to govern their servants in their employ. The same influence calls for a stringent insisting upon obedience on the part of the servant to such regulations when made. If a master makes a proper regulation for the protection of his servant, and the servant is informed of that regulation, and bidden to conform to it, and the servant chooses to violate the regulation and the order, and is injured, he must bear the burden.

> " Misconduct on the part of the servant directly
> " contributing to the injury would bar a recov-
> " ery. Many instances might be given of this,
> " among which *a conspicuous one is when the*
> " *servant disobeys a reasonable regulation estab-*
> " *lished for his safety.*"
>
> 2 *Thompson on Negligence*, 1018.

(2). The Courts have frequently held this to be the law.

In *Shanny vs. Androscoggin Mills Co.*, 66 Maine, 420, the plaintiff had been directed not to clean the machine of which she was in charge while it was running. She disobeyed this order and was injured. The Court (six Judges concurring) say:—

> "The only inference which can be drawn from
> "the testimony is that plaintiff's injury came to
> "her while disobeying a rule adopted by the de-

"fendants regulating the very work in which plain-
"tiff was engaged. That the defendant had the
"right to make the rule is not denied. That it was
"reasonable and proper is evident from the fact
"that it was made for the protection of operatives,
"and, if obeyed, this injury could not have hap-
"pened. * * * The testimony so decidedly
"shows a want of due care on her part, and that
"the injury occurred while she was acting con-
"trary to a regulation made for her own protec-
"tion, that we conclude that the verdict of the
"jury was the result of a failure to comprehend
"the case or of a prejudice so strong as to prevent
"the candid exercise of their judgment."

In the *Memphis, &c., R. R. Co. vs. Thomas*, 51 Miss., 637, a regulation forbade an engineer to run his engine at a speed of more than 10 miles an hour under certain circumstances. He knew of the regulation, disobeyed it, and was injured by a collision. The Court say this was an "insurmountable obstacle to recovery."

In *Lyon vs. The Detroit Railroad Co.*, 31 Mich. 429, the Court held that an engineer of a train who had disregarded the instructions which the Company had issued for his guidance, was *therein* guilty of gross negligence which directly contributed to the injury, and that he could not recover.

In *Brown vs. Byroads*, 47 Ind., 435, the plaintiff was employed in a stave factory to catch the pieces as they were cut off by the machine. At the time of his injury he had exchanged places with the sawyer, who acted as catcher. This exchange of place was in direct violation and disregard of defendant's directions and instructions, and the Court held the plaintiff could not recover.

(3). In the present case the learned Judge not only refused to direct a verdict for the defendant, but also refused to instruct the jury that such was the law (fol. 187).

He justified his refusal to charge as requested by saying:—

> "I don't understand that Craven warned the "workmen not to stand in the hatch because there "was danger of falling tubs, but because there was "danger of falling lumps of coal which might be "jostled from the tubs in their ascent" (fol. 189).

This was a misapprehension of the evidence as well as the law.

Craven's direction to the plaintiff was absolute. It was "*not to be standing underneath the hatch with a draft coming up*" (fol. 100). It was not coupled with any reason whatever. The evidence of danger, mentioned by Craven, was given in answer to the question whether the position was a dangerous one, *in his opinion.* Moreover, his answer stated the danger to be danger "of *anything* falling." "Anything" included tubs, as well as coal; and the fact that he afterwards mentioned that a lump of coal might fall from the tub, cannot, for any reason, be considered as confining the danger to a single lump of coal, and excluding a tub of coal.

The attention of the Judge was expressly called to this matter at fols. 200–1, but he refused to correct his error. But as well on the reason of the matter as on the evidence and the law, if the decisions which we have cited are not to be overruled, he should have directed the jury to find for the defendant; or, failing in that, he should have instructed them that the danger which the plaintiff incurred, by standing under the hatch, included the fall of the tub, and that if he had been instructed not to stand under the hatch when a draft was going up, and, disobeying that direction, was injured by the fall of a draft, he could not recover. These errors alone are abundant ground for the reversal of the judgment.

C. But, in addition to this positive direction, the plaintiff had been repeatedly warned against danger to be apprehended from the tubs themselves. Gerraghty says: "I have often told them (referring to the men in

the hold) to keep clear of the hatch and look out for them tubs" (fol. 134).

The plaintiff nowhere denies that he had received such directions and warnings, and it is therefore a conceded fact that he had. Moreover, he nowhere indicates that he did not know that it was a dangerous act to place himself under an ascending load; on the contrary, he recognized the danger, but sought to throw the responsibility of his incurring the risk upon an order he says he had received (fol. 45).

"Q. And then this tub went up on this side?

A. Yes, sir.

Q. And then, as I understand, the tub was going down on the out shore side?

A. Yes, sir.

Q. And you simply stepped up and grasped it with your hand?

A. *I was told to do so.*"

D. The plaintiff's duty did not require him to disobey Craven's order, disregard Gerraghty's warning, and place himself in a position where disobedience subjected him to injury.

(*a.*) This appears from the testimony.

The plaintiff says (fol. 40): "Q. Where did your duty require you to be—in what part of the hold?

A. *Right by the edge of the hatch.*

(Fol. 46). Q. Was there another man there doing the same work?

A. He was on the opposite side.

Q. On the opposite side of the hatch?

A. Yes, sir.

Q. Who was he?

A. Thomas Henretty."

Craven says (fols. 99-100) that there was a man stationed on each side of the hatch, down in the hold, to attend to the tub operated on each side of the hatch.

"One man could not be running around across to the other side to unhook tubs."

At fol. 107 he says: "Q. Then if the tub nearest the man is going up, in order to grasp the tub coming down it would be necessary for a man to step forward to get it?

A He has not to do that."

Evidently because that is the duty of the man on the opposite side of the hatch.

"Q. Suppose the tub got down to the floor or to the top of the coal, supposing the hold to be full of coal, he has then got to go under the hatch to get the tub?

A. No, sir; he can stand on one side of the hatch."

This is in corroboration of the plaintiff's story, that his duty required him to be "right by the edge of the hatch."

And again (fol. 110): "Q. Is it necessary for a man who is down in the hold, and whose duty it is to unhook and hook on the tubs at any time, to step out in the hatch under a loaded tub for any purpose?

A. No, sir.

Q. The tubs can be reached from each side of the hatch, can they not?

A. Yes, sir.

Q. And on this occasion you say there were two men, one to attend to each tub?

A. Yes, sir. * * *

Q. On that occasion each man had his own tub to attend to?

A. Yes, sir.

Q. A tub on each side of the hatch?

A. Yes, sir."

Gerraghty, on cross-examination, says (fol. 143):

"Q. To unhook and hook on and off tubs they had to be around the hatch?

A. Yes, sir; he had to be around the hatch; he need not stand under the hatch; a tub comes up each side of the hatch and he hooks on this tub here and stands back, and the tub comes down on the other side and the man catches that tub" (fol. 144).

Plaintiff's counsel, in some of his questions to this

witness, bases them upon the assumption that the *plaintiff was the only man in the hold*, and that his duty was to attend to both tubs. He entirely overlooks the man stationed on the opposite side of the hatch from the plaintiff, whose duty it was to take charge of the tub on that side of the hatch. Upon that assumption the answers of Gerraghty would seem to indicate that the plaintiff might be obliged to step out under the hatch. In the absence of that man a different line of conduct might possibly be imposed by the plaintiff (see fols. 144, 146), and the Court fell into the same error (fol 190).

Even upon this erroneous assumption the Court did not fairly state the testimony to the jury, for the inference from Gerraghty's testimony and Craven's, to which the Court did not refer at all, is that under no circumstances would it have been necessary for the plaintiff to have put himself in a position where he would encounter danger.

But that other man *was* there, and being there, the *plaintiff's* duty required *him* to be at the edge of the hatch, not under it. There was no necessity for him to interfere with the duty of the man opposite to him.

(*b*). It may be suggested that it was incumbent on the plaintiff to cross the hatch to catch the tub descending on the opposite side, by reason of an order to cross whips, which means that both tubs should be worked on one side of the hatch where the coal was (fol. 144). But there is no evidence that any such order was given; and manifestly it had not been given, because a man had been placed on the opposite side of the hatch from the plaintiff during the whole time, thus relieving the plaintiff from the duty of attending to that tub under any circumstances (fols. 44, 46, 99 and 144).

But if it should be claimed that in order to get the coal out from the side of the vessel where the plaintiff was stationed, it was necessary to "cross whips," still that operation did not require the plaintiff to attend to the tub on the opposite side of the hatch, and for that

purpose, to cross the hatch under the ascending tub; because, as all the coal was on the plaintiff's side of the vessel, they must have been crossing whips the entire time, and yet a man was stationed on the opposite side of the hatch whose duty it was to attend to the tub there. In other words, the fact that there was a man on the other side of the hatch from the plaintiff, relieved him from the necessity of attending to the tub there even under the circumstances of "crossing whips."

(*c*). It may also be suggested that the plaintiff's duty required him to obey orders, and he says (fol. 45): "I was told to do so."

This is no justification. There is no evidence that the direction came from any one clothed with authority to give such order (Plaintiff, fol. 47), and the defendant is, therefore, not responsible for the consequences resulting from such an order.

Wood on Master and Servant, page 889.
Felch vs. *Allen*, 98 Mass., 572.

Moreover, such a direction, even from a superior, affords no excuse.

Jones vs. *The Railroad*, *supra*.

E. The plaintiff, heedless of the apparent risks, disobedient of the express direction, and regardless of the repeated warnings, interfered with the duty of the man opposite him, and placed himself in a position in which he received his injury. Standing by the edge of the hatch he hooked on his tub loaded with coal, and, while it was ascending, stepped out from under the deck, a place of safety, and crossed the hatch directly under the ascending load. While in the act of crossing, the loaded tub fell upon him (Plaintiff, fols. 44–45).

This is the plaintiff's own testimony, and the Court, in its charge to the jury, entirely mis-stated the evidence in this respect (see fol. 189).

The plaintiff has thus sustained injury by his own negligence, by his own want of ordinary care and pru-

dence, but for which negligence or want of care and caution on his part, the misfortune would not have happened. He is, therefore, not entitled to recover. His fellow-servants, working by his side, were not hurt, and there is no dispute that had he remained at the edge of the hatch, where his duty assigned him, he, too, would have escaped. The duty was imposed upon him, under the circumstances, to exercise great care and caution, but he failed to observe even the slightest prudence. The circumstances, taken in connection with the occurrence, do not indicate or tend to establish any cause for the accident consistent with the exercise of proper prudence and care on the plaintiff's part. The inference of the plaintiff's negligence, therefore, is the only one left to be drawn, and it was error to give the jury the opportunity to draw any other (see the eleventh error assigned).

Second Point.—The Court should also have directed a verdict for the defendant because the evidence failed to establish negligence on the part of the defendant.

I.—The burden was on the plaintiff to show that the defendant was guilty of some breach of duty towards him. No presumption arose from the happening of the injury.

Shearman and Redfield on Negligence, §§ 12, 99.
Wharton on Negligence, second edition, §§ 421–428.

II.—The complaint alleged as the negligence of the

defendant that it provided and *used* unsafe, defective and insecure hoisting apparatus (fol. 8).

The law does not impose upon the master, in his relation to the employee, the duty of *using* any apparatus; the duty for which the servant is hired is to *use* the appliances furnished by the master, and the Court, when it referred to the negligence of the defendant in *using* a rope (fol. 191), imposed a new duty upon the defendant, for which there is no authority.

III.—It is the duty of the master to provide and maintain in suitable condition the machinery and appliances *to be used by its employees.* That duty is discharged when its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally, as in keeping them and maintaining them in such condition as to be reasonably safe for use by the employees.

Hough vs. the R. R. Company, 100 U. S., 213, 218, 219.

This, certainly, relieves the employer from any duty with regard to the *use* of the appliances.

(*a*). The undisputed testimony establishes that the defendant was not guilty of any breach of duty imposed upon it.

(1). The rope, when purchased and originally furnished to the men, was of the best quality manufactured, and had, during its use, been continually subjected to careful inspection by the servant to whom this duty was assigned, *and there is no evidence that when it was rigged on the night in question it was not sufficient and adequate for the work. On the contrary, it is established that such was the fact.*

It was a three and three-quarter manilla rope, manufactured by the well-known firm of William Wall's Sons, capable of bearing a working strain of five tons. (Low, fols. 113–114; Peck, fol. 116; Smith, fols. 118–119.)

It had been purchased April 13th preceding the injury (Peck, fol. 116; Smith, fol. 119), and the coil was then cut into three falls for hoisting coal (Smith, fol. 119), a full tub of which weighs about three hundred pounds (plaintiff, fol. 40). The fall was put in use about a fortnight after the purchase (Smith, fol. 130), and used only as a coal fall two days in the week for about six months, the usual time for such a fall (Graham, fols. 167–168; Craven, fol. 110), until about a week before the injury (Smith, fol. 119); the worn parts were then cut out and a five foot splice put in, reducing the length of the fall nearly one half (Smith, fols. 119–121); after that it was used twice before the accident (Smith, fol. 119). On the night in question Craven directed Graham to get a good, short fall (fol. 106) and place it in position for work. He went to the storehouse, where the falls were kept in charge of Smith, selected a fall from among others there, and directed a rigger, Short, to take it to the dock. Short did so, and rove it through the block on the gaff over the hatch, under Graham's superintendence.

Smith says before the rope was taken from the storeroom he had examined it carefully, and it was in a good condition to go out again to work (fol. 120).

Graham says that its condition was good for that work as a coal fall (fols 152, 161, 162, 167), by which he means, as the Court stated, that what was good enough for three hundred weight might not be for twenty-one or twenty-five hundred weight.

Short says that Graham remarked that the fall was a good one, and that as he saw it it looked to be a pretty good fall (fols. 176–7).

Craven saw the fall after it was rigged, although he did not then examine it critically. He says (fols. 96, 106) that there was no defect in it whatever that he could see. He examined it carefully the morning after the injury, and says (fol. 101) the turns were all out where the splice was; the rest of it was all right; it was a little bit chafed where the splice was, and that was

all. It was not enough chafed to hurt it if the turns were in it.

"Q. Was this rope, or any portion of it, in such condition that it would break with the weight of five hundred pounds on it, when you saw it the next morning?

A. No, sir; not one particle" (see also fol. 109).

To the same effect is the testimony of Gerraghty, at fol. 146, and Redmond, at fol. 148. A piece of the same coil which had been in use for two years after the accident was subjected to the test of two thousand pounds successfully (Craven, fol. 103; Smith, fol. 130).

There is no evidence whatever offered by the plaintiff in conflict with the foregoing, as to the condition of the rope when work began. It must, therefore, be conceded that it was good and adequate at that time.

The only witness for the plaintiff who pretended to know anything about the condition of the fall at any time was O'Brien, who had charge of the drum which operated that fall, but even he does not pretend to have noticed anything the matter with the fall until a considerable time after it had been in operation (fols. 73–193). The only intimation he gives as to its previous condition is at folio 77, when he says, in answer to the question—

> "Could that rope have worn down to that condition on a fall passing through six pulleys from the time they commenced to hoist to the time it attracted your attention?"
>
> "It is a very hard thing for me to say. The only thing I can say is that had the rope been *new* it would not have worn so quick, but as the rope was worn before it seemed as though it wore out quicker, and when it came under my notice I saw it was chafed."

His testimony, therefore, and it is the only testimony on the subject, does not afford the shadow of a ground for finding that the rope was defective or insufficient when the work began. The learned Court, at fol. 194, stated, as the plaintiff's claim, that because O'Brien says it was chafed about eight o'clock, and the turns

were loosened at eight or nine o'clock, therefore it must have been in a visibly unsound condition at five or six o'clock, thus erroneously allowing the jury to draw an inference without the least support in the testimony for it; and in this respect the Court erred in refusing to charge, as requested at fol. 202, being the thirteenth error assigned.

(2). The rope was spliced with a five foot splice, which had been properly made (Smith, fols. 119–121–125; Craven, fols. 97–110; Redmond, fol. 148; Graham, fols. 152–163–166). This is not contradicted; and the Court instructed the jury that the rope was spliced (fols. 192–193). It is customary to use spliced falls for such work, and the splice does not constitute a defect nor weaken the fall for work (Craven, fol. 98; Low, fol. 115; Smith, fols. 119–122; Gerraghty, fol. 134; Graham, fol. 153; Sinclair, fols. 169–173–174). This is not disputed, and is in fact conceded by plaintiff's counsel (fol. 98).

(3). The cause of the accident was the drawing of the splice by reason of the fall untwisting, or, as it is otherwise expressed, the turns coming out of the rope (Craven, fols. 101–109–111; Smith, fols. 121–122–126; Gerraghty, fols. 135–145–147; Redmond, fol. 148. And the Court charged the jury:

> "It may furthermore, in my opinion, be con-
> "sidered as a fact that the rope was a spliced rope,
> "and that the injury happened by the untwisting
> "and drawing apart of the portion of the rope
> "spliced" (fol. 192).

The jury were therefore bound to decide the case upon this theory; otherwise it would have been the duty of the Court to set the verdict aside as against the weight of evidence.

(4). It is a usual incident to the operation of a single fall such as this was that it will untwist. Such untwisting is only a temporary hindrance to the use of the

rope, to be prevented or corrected by those operating the fall during its operation (Craven, fols. 102–103; Smith, fol. 121; Chris Gerraghty, fols. 133–146–147; Graham, fol. 153–163; Sinclair, fols. 169–172; Thomas Gerraghty, fol. 178). And the Court so stated the plaintiff's claim in that regard (fols. 193–198).

(*b*). The evidence, therefore, showing, without controversy, that the fall was sufficient and adequate, if not allowed to become untwisted, a natural incident to its use, and that the injury occurred from the rope untwisting, which could and should be guarded against by the workman during its operation, as part of that operation, failed to establish negligence on the part of the defendant. It had furnished and maintained a suitable and adequate apparatus from which injury could not arise if that apparatus was properly and carefully used by the employees.

IV. —The duty of the master with regard to furnishing and maintaining suitable apparatus for employees is no different from his duty to provide reasonably safe places and structures for his servants to work upon.

But this obligation does not impose upon him the duty of keeping the apparatus which the servants use, or the structure where they are working, in a safe condition at every moment of the work, so far as such safety depends upon the due performance of that work by them and their fellows.

Armour v. *Hahn*, 111 U. S., 313.

The safety of the fall, not defective in itself, depended upon the due performance of the work of operating it by the workmen. It was liable to untwist, and as a part of its operation it required care and caution to see that the untwisting did not continue too far, or to retwist it again. Just so a boiler requires to be supplied with water when it gets too low, or the use of the escape to prevent too high pressure of steam, or the speed of the engine requires to be reduced if the journals

or bearings become over-heated. These incidents and conditions do not constitute defects in the fall, boiler or engine, but simply temporary hindrances, to be overcome or obviated by those operating the particular appliance.

The defendant was under no obligation either to use this fall properly or carefully, or to see that it was so used. That duty devolved upon the employees, the due performance of whose work in operating the fall required that they, not their master, should use it carefully, should not let the turns come out, or if they did, should put them back again.

Third Point.—Furthermore, the Court should have directed a verdict for the defendant on the ground that the injury was occasioned through the negligence of a fellow servant, for which the defendant is not liable.

I.—No question arises as to the competency of the employees. The plaintiff, therefore, took the risk of the negligence of his fellow-servants in the performance of their duties. The men engaged in the working of hoisting out coal were engaged in a common employment, and, therefore, fellow-servants. They were all working in the same department, and under the same general direction, and none of them was entrusted with the sole duty of control and direction.

(*a*). It must be conceded that the plaintiff, who hooked on the tubs, and O'Brien, who operated the drum, were fellow servants. If, therefore, the injury was occasioned solely by the neglect of O'Brien in the perform-

ance of his duty in any particular, the defendant is not liable.

Chicago, Milwaukee and St. Paul R. R. Co. vs. *Ross*, 112 U. S., 377.
Buckley vs. *Gould and Curry Silver Mining Co.*, 14th Fed. Rep., 833, and notes.
Wood vs. *The New Bedford Coal Co.*, 121 Mass., 252.

(1). It was the duty of O'Brien, in the management and operation of the drum and fall, to keep watch of the rope, and if the turns came out to stop his drum and put them in again (Thos. Gerraghty, fols. 178–179; Craven, fols. 103–107; Smith, fol. 121; Chris. Gerraghty, fols. 146–182).

In addition to this duty he was particularly directed to watch the rope, and if the turns came out, to stop and put them in again (Gerraghty, fols. 135–140–182; Redmond, fols. 148–149).

O'Brien admits this (fol. 181), although, perhaps, in a qualified way. He says: "If there was a stoppage;" but as he had control of the drum, this qualification does not affect his duty, and the result of his testimony, in connection with that of the other witnesses, none of which is contradicted, is that it was beyond doubt his duty to attend to the fall.

(2). He failed in his duty. If his story is true, when, at about 8 o'clock, he first noticed that the fall was getting out of order, he did nothing; he neither sent word to anyone, nor did he stop his drum to correct the difficulty (O'Brien, fols. 73–84).

The Court again misstates the testimony when it says, "when O'Brien called Gerraghty" (fol. 194). O'Brien expressly says he did not. He continued working until Gerraghty came down at about 9:30, having been informed by some one—not O'Brien—that the fall was geting out of order.

When O'Brien noticed that the fall was getting worse after Gerraghty's visit, he still did nothing. He reported it to no one, and did not stop his drum in order to

put the turns back, but continued using it. As the turns had come out once they were likely to do so again, and yet O'Brien did nothing to avert any injury that might occur from their so doing, although he says he thought some one might get hurt (O'Brien, fols. 75–85).

He tried to excuse himself for disobeying Gerraghty's orders (fol. 181); but that excuse is unavailing in view of the evidence that it was his duty to stop the drum, over which he had absolute control (O'Brien, fol. 72; Redmond, fols. 148-149; Gerraghty, fol. 178). He says he spoke to Gerraghty a second time about the rope getting worse, but what Gerraghty said or did then he does not know (O'Brien, fol. 75); so that the testimony of Gerraghty and Redmond stands uncontradicted that Gerraghty, when he last left the scow, directed O'Brien to watch the rope, and if the turns came out to put them back again. O'Brien continued to hoist, and shortly after, how long he does not say, the fall carried away. Redmond says an hour and a half or an hour (fol. 149). O'Brien, therefore, failed in his duty, both with regard to the usual care necessary in the operation of the fall, and also in disobeying the positive order of Gerraghty.

The accident was caused by the turns coming out of the rope during its operation, which is, therefore, directly attributable to O'Brien, to whom was entrusted the care of the rope during that operation; and the Court erred in refusing to charge the jury, upon the testimony as to O'Brien's duty and the direction from Gerraghty, that if the injury was occasioned solely by the neglect of O'Brien the plaintiff could not recover, which is the Fourth error assigned. The refusal so to charge was equivalent to instructing the jury that the defendant was liable for O'Brien's acts, which is clearly erroneous (Fourth and Eighth errors assigned).

(*b*). But admitting, against the testimony, that O'Brien did not fail in any duty devolving upon him, and that the accident is attributable to the omission or commission of Gerraghty, the defendant still is not liable.

(1). It must be conceded that if Craven was in charge when information was given of the trouble with the fall, notice to Gerraghty of that trouble would not be notice to the company; it would be simply notice to a fellow-servant, for the consequence of which the defendant would not be liable, and so the learned judge charged at fol. 196.

O'Brien says he noticed the rope chafed shortly after 8 o'clock (fol. 73), and shortly after that Gerraghty came on the scow and he told him about it (fol. 84). If O'Brien's "shortly after" or "not long" extends to an hour, then Craven was not in charge, for he left Gerraghty in charge at 9 o'clock (Craven, fols. 99 105; Gerraghty, fol. 145). But in the absence of evidence as to how long O'Brien's "shortly after" was, and in the absence of evidence that Craven was not in charge, notice to Gerraghty was insufficient to bind the defendant, and in this respect the Court erred in admitting testimony of conversations between O'Brien and Gerraghty, which is the eighteenth error assigned. In order to make that testimony admissible it should have been shown, as matter of fact, that Craven was not in charge at the time. This nowhere appears.

(2). But assuming that Gerraghty was in charge at the time O'Brien spoke to him concerning the rope, Gerraghty's action in reference to the rope was the act of a fellow-servant.

> *First.—He was not the alter ego of the defendant, but a mere fellow-servant with the defendant.*
>
> *Second.—His acts with reference to the fall were not done in performance of any duty devolving upon the defendant as master, but simply the duty of an employee.*

First.—Gerraghty was a mere coal boss. His duty at no time was entirely that of direction and control. He

worked with the men, doing their work (fol. 132), and they, therefore, could become fully acquainted with him within the doctrine of *Hough* vs. *The R. R. Co.*, above cited. His duty was to see that the men did their work properly. The duty of supplying or maintaining the apparatus was not incumbent upon him (Craven, fols. 99-109; Gerraghty, fol. 132). He was simply left in charge of the men when Craven went away (Craven, fol. 105). He might have had the power to hire and discharge men in Craven's absence, but Craven was seldom, if ever, absent (fols. 99-113). But the power to hire and discharge men did not change his relation of fellow-servant to the plaintiff.

Brown vs. *The Wynona R. R. Co* 27 Minn., 162.
Hoth vs. *Peters*, 55 Wis., 405.
Keystone Bridge vs. *Newbury*, 96 Penn. St., 246.
McDermott vs. *Boston*, 133 Mass., 349.
McDonald vs. *The Eagle*, &c., 67 Ga., 761.
Yager vs. *Atlantic, &c., R. R. Co.*, 4th Hughes, 192
Quinn vs. *The New Jersey Lighterage Co.*, 23 Fed. Rep., 363.
Hough vs. *The Railway Co.*, supra.
Gallagher vs. *Piper*, 111 Eng. Com. Law., 669.
Crispin vs. *Babbitt*, 81 N. Y., 516.
Petersou vs. *The White Breast Coal Co.*, 50th Iowa, 673.
Mullen vs. *The Steamship Co.*, 9 Philadelphia, Pa., 16.
Lawler vs. *The Androscoggin R. R. Co.*, 62 Me., 463.
Collins vs. *Steinhart*, 51 Cal., 116.
Marshall vs. *Schricker*, 63 Mo., 308.
Hamilton vs. *The Iron Mountain Co.*, 4 Mo. App., 564.

He was acting in the same department, under the same general direction, and he was not the agent of the

defendant, clothed with the control and management of a distinct department, in which his duty was entirely that of control and direction.

Hough against R. R. Co., supra.

Second.—The operation of the fall, and the exercise of care and caution in that operation were not masters' duties.

The Court charged—

> "It may furthermore, in my opinion, be considered as a fact that the rope was a spliced rope, and that the injury happened by the untwisting and drawing apart of the rope which was spliced" (fols. 192–3). Again—
>
> "The plaintiff says that the admitted danger to spliced ropes is that of untwisting, *and that caution is to be used* not to have them untwist" (fol. 196). Again—
>
> "The plaintiff says it is manifest * * * that "the rope was in bad condition, *and was in dan-* "*ger of untwisting*, and that Gerraghty did not "appreciate the danger, and was satisfied with "simply twisting the turns, replacing the rope, "and going away; that the calamity which fol- "lowed showed that the rope was in a danger "ous condition, *by reason of untwisting, or liabil-* "*ity to untwist;* and next, that if Gerraghty's "testimony is true, and he left the rope, simply "saying to O'Brien if it became untwisted put the "turns in, *and did not return to watch it*, and the "calamity happened; that is Gerraghty's neglect. "* * * *That the important duty of the hour* "*was to see that the rope did not untwist;* and "that when he went away upon the vessel and "did not return, content to entrust the matter to "an ordinary workman, *and the calamity hap* "*pened through the workman's neglect*, it is the "fault of Gerraghty, *because he had no business* "*that night to abandon the oversight of the rope*

"in the condition in which it was when he saw "it" (fols. 197-8).

The Court then charged—

"If you think that the rope was in a good con- "dition when it went upon the fall, and thereafter "became in a bad condition, which Gerraghty, "then being in the shoes of Craven, and in the "absence of Craven, knew, and *which he ought to* "*have attended to himself, and which he did not* "*attend to, and the accident happened in conse-* "*quence of his negligence*, then the plaintiff has "made out his case" (fol. 198-9).

We submit that such a charge as to the defendant's duty is entirely erroneous, and has not the support of a single authority.

(*a*). The defendant did not undertake responsibility for the acts which are ordinarily to be performed in the service by a servant, and is therefore not liable for the negligent performance of those acts. The Master does not undertake that he will in person attend his servants and advise and superintend the business and labor to be performed, nor that he will send another to stand in his place, so that whatever such person may do or order to be done, as between himself and his servant, is his act. His liability depends only upon failing to perform *his* duty toward his employees, not failing to perform the *employee's* duty.

Railroad vs. *Ross, supra.*
Hough vs. *the R. R. Co., supra.*
Crispin vs. *Babbitt, supra.*
Quinn vs. *The New Jersey Lighterage Co., supra.*

It was not the defendant's duty, either to use "care and caution not to have the rope untwist," or to "watch the rope," or to observe the "important duty of the hour to see that the rope did not untwist." These acts all related solely to the use, operation and manage-

ment of the apparatus, for which the employees were hired. These acts constituted part of this operation and management, just as much as running an engine too fast or too slow, as attending to the boilers to see that the water does not get too low or too high, that steam pressure does not get too great or too little, or preventing a band slipping from a wheel, or hooking on the tubs properly so that they would not become unhooked.

The case was erroneously submitted to the jury upon the issue of Gerraghty's negligence in not attending to the fall, either to see that it did not untwist so as to allow the splice to draw, or to retwist it before that occurred.

If the careful and cautious *use of the rope*, if watchfulness in its use, would prevent it from untwisting, that careful and cautious use and that watchfulness was incumbent on the employees. It being customary to use spliced ropes, which, in all cases *are adequate if carefully used*, and it being an incident of their use that they may untwist, the plaintiff took upon himself the risk of such use, and the turns getting out through inattention on the part of those operating the rope, and consequently of the results of such inattention. These are circumstances arising in the operation of the appliances, which is the servant's duty.

Crispin vs. *Babbitt*, *supra*.

They are the details of the work necessarily entrusted to the servant, and for inattention to these details the master cannot be held liable. It is not the question of supplying or maintaing adequate machinery, but it is the question of the careful use of adequate appliances supplied.

(*b*). The case was given to the jury on the theory that the act of Gerraghty, or his failure to act, with regard to a detail of the operation of the fall, was the act of the master, which was entirely erroneous.

The Judge left the matter to the jury to determine on the evidence whether Gerraghty was in fact exercising the duties of Craven, the defendant at the time.

We say this was error. But assuming it to be correct, he then told them that it was the plaintiff's claim that if Gerraghty was exercising the duties of Craven, it was a fault to *go away* "because he had no business that night to *abandon the oversight* of the rope." He then told the jury that if they thought that Gerraghty "ought to have attended to it himself," or if he did not, and the accident happened by reason thereof, the plaintiff was entitled to recover.

This was telling them that the duty of the master was not only to furnish sufficient appliances, but also, if sufficient appliances are furnished which get out of order and *are put in good order again*, the master must *remain and see to it* that the appliance does not get out of order a second time.

This extends the master's duty far beyond any rule which has ever been laid down.

The master is bound to furnish sufficient appliances. If they become out of order and such fact is brought to his notice, he is bound to see that they are put in order again; but, having done that, he is not charged with the duty of standing by and seeing that the appliance, now in good order, *does not get out of order* a second time.

This oversight is not the duty of the master, but of the servant, and if it had been Gerraghty's duty not to abandon the oversight, but to attend himself to the rope to see that it did not get out of order a second time, in so doing he would be performing the duty, not of a master, but of a servant, and for this negligence in that respect, the master could not be liable. It is a natural incident to the use of all appliances that they may get out of order. This may occur through natural wear and tear, or through the negligent performance of the operations in the use of the appliance. In neither event is it the duty of the master to see that they do not get so out of order. His duty is fulfilled when he places them in good order upon being notified of their condition.

But the Court charged that it *was* the master's duty to see that this fall did not get out of order; this would

make the master an insurer of the servant's safety, which is contrary to all the decisions.

The servant represents the master only in respect to such duties as the law imposes on the master. "None of the better class of cases go beyond this rule."

Wood on Master and Servant, p. 890.

(*c*). The conductor of a train in the management of the train represents the master, and for his negligence the master is liable for injuries sustained by an engineer.

Chicago and Milwaukie Co. vs. *Ross, supra.*

It is the duty of the master to furnish and maintain a safe and adequate engine.

Hough vs. *the R. R. Co., supra.*

Now, assume an engine when starting to be in a suitable condition, and during the journey the steam pressure is allowed to exceed the limit, or the water in the boiler is allowed to get too low, in either of which conditions there is danger of explosion, and therefore at that time the engine is not in a safe or suitable condition. Does the law, which imposes upon the master the duty of maintaining the engine in a suitable condition, require that the master should stand by and see that the engine does not get into this dangerous condition; or, if the conductor is notified of such condition, that he, as the representative of the master, should not only correct the danger, but stand by and see that it does not occur again? Most assuredly not. It would be impossible that the master could exercise such personal supervision over the different details of the operation of the train.

So also would it be impossible for the master to exercise through a coal boss such personal supervision over each detail of the operation of coaling or shifting coal, and the law imposes no such duty on him.

True, in Craven's absence Gerraghty had charge of the shifting of the coal, which included the oversight of the men and, in a certain sense, of the appliances necessary for the work, but that did not necessitate his per-

sonal action, *as the defendant's representative*, with regard to all the details of the work. In other words the defendant's duty to maintain the appliances in a suitable condition did not include the due performance of every act during the operation of the appliance incidental to its safe operation.

In this respect the Court erred in refusing to charge as requested, as set forth in the Second, Third, Fifth, Sixth, Eighth, Twelfth, Fifteenth, and Sixteenth errors assigned.

Fourth Point.—The Court erred in its charge to the jury, as well as in refusing to charge as requested by defendant's counsel.

It was error for the Court to refuse to give instructions asked for by the defendant, if correct in point of law, because those given did not cover the entire case nor submit it properly to the jury.

Laber vs. *Cooper*, 7 Wall, 565-571.

The Court not only repeatedly misstated the testimony, but also failed entirely to consider important questions of law applicable to the evidence in the case, as to which the defendant was entitled to have the jury instructed.

The previous consideration of the motion to direct a verdict in defendant's favor involves most of the questions arising under the charge. A brief reference, however, will be made to the errors assigned in this regard.

(1). Second error assigned (fol. 183). This request was strictly in accordance with the law.

Crispin vs. *Babbitt*, (*supra*), citing

Albro vs. *Agawam Canal Co.*, 11 Irish C. L., 353.

Wood's Master and Servant, Sec. 438.

And the principle is recognized in *Hough* vs. *The Ry. Co.* (*supra*).

The Court in its charge nowhere discriminated between a duty devolving upon the master, for breach of which the master would be liable, and one devolving upon a servant, for breach of which there would be no such liability. The jury were, therefore, erroneously left to infer that the defendant would be liable in both instances, which is contrary to the law. If the proper distinction between the duties of a master and the duties of a servant, as to this hoisting apparatus, is kept in mind, certainly the "management and operation" of it falls within the former, not the latter. And whoever had the charge of that "management and operation" was certainly *in that* the fellow-servant of the plaintiff.

The defendant was, therefore, entitled to have the jury charged as requested, unless the facts showed, without contradiction, that the untwisting of the rope was not incident to the management and operation, which certainly cannot be maintained.

(2). Third error assigned (fol. 184). The evidence tended to show that the injury occurred from carelessness in *the operation* of the fall, which was not master's duty, but servant's duty; and even had there been a conflict upon this point, the defendant was entitled to have the jury instructed that for such carelessness, no matter on whose part it occurred, the defendant would not be liable.

(3). Fourth error assigned (fol 184). There was no question whatever as to O'Brien's relation to the plaintiff. They were fellow-servants, and there was evidence which tended to show that the injury happened through his failure to perform his duty. For this breach of duty the defendant was not liable. And the defendant was entitled to have the specific charge that if the injury was due solely to his negligence, the plaintiff was not entitled to recover. The judge, no doubt, charged the

general proposition at fol. 191, but he nowhere told the jury that O'Brien was a fellow-servant of the plaintiff, for whose negligence the defendant was not liable.

(4). Fifth error assigned (fol. 185). This has been considered. (See *ante* pp. 23 to 27). The Court refused entirely to consider the question of the negligent operation of the fall, although the evidence tended to estab lish that the due performance of their work by the employees required them to prevent or correct the untwisting of the fall, which was a natural incident to its use.

(5). Sixth error assigned (fol. 185). This request was strictly in accordance with the law. The evidence tended to establish that the defendant had performed its duty in supplying and maintaining adequate appliances, and that the injury occurred through the negligent use of such appliances by the workmen. If such were the case, the defendant certainly was not liable. The jury, however, by this refusal, were left to infer that, even had the defendant performed its entire duty, it might be liable.

(6). Seventh error assigned (fol. 186). This request stated the defendant's duty exactly in the language of *Hough* vs. *The Railway. Co.* The refusal so to charge was equivalent to instructing the jury that the defendant's duty was more extensive than as therein laid down.

(7). Eighth error assigned (fols. 186-7). The request included a statement of all acts as to this rope which the master's duty required. It included the putting the rope in an "apparently good condition," and the leaving in charge a competent servant, with directions as to what should be done, if the subsequent use of the rope should have such an effect upon it as to indicate, by a change in its appearance, that that apparent good condition was becoming bad.

The fullest requirement of the rule as to master's duty called for no more. The refusal of the Judge to charge as thus requested, and his charge at fols. 198-9, would make it the master's duty not only to furnish appliances in apparently good condition, but also to himself stand by and attend to their use, and see to it that such use was not continued after any change in such condition appears.

But this latter is not master's duty, but servant's duty.

(8). Ninth error assigned (fol. 187). This error we have mainly discussed on pp. 14 to 19. The Court stated erroneously that "the plaintiff insists that he was not under the hatchway, but on the edge of it" (fol. 189). The jury should certainly have been instructed as to the law in the event of their finding the fact to be as plaintiff had actually stated at fol. 44, and that the plaintiff was injured while disobeying the direction given for his protection.

(9). Tenth error assigned (fols. 189, 200-1). This has been fully considered under the *First Point.*

(10). Eleventh error assigned (fols. 190, 201). The Court entirely disregarded the evidence as to the direction and the repeated warnings to the plaintiff, as well as of the manifest danger of the position, and left it to the jury to say that the plaintiff, although disobedient and heedless, could recover if injured by the unanticipated negligence of the defendant. This doctrine is directly contrary to the law of *Jones vs. The R. R. Co., supra.* The servant does not take upon himself the risk of injury from the master's negligence. Such negligence is therefore always unanticipated. In the *Jones* case the collision which resulted from the defendant's negligence, was not anticipated by the plaintiff, and yet the plaintiff was not allowed to recover.

(11). Twelfth error assigned (fols. 192, 201). The Court held, as matter of law, that Craven was a representative of the defendant, for whose negligence the defendant would be liable. As to Gerraghty, he submitted the question of his position to the jury as a question of fact. One ruling or the other must have been error (see Fourteenth error).

(12). Thirteenth error assigned (fol. 202). This request was in conformity to the rule that a question should not be submitted to the jury upon a mere scintilla of evidence.

Improvement Co. vs. Munson, 14 Wal., 442–448.

We have referred to the testimony of O'Brien upon this point (fol. 77), and insist that it is wholly insufficient to warrant the submission of the question to the jury, as the Court did (fol. 193). The defendant was entitled to have this error corrected.

(13). Fourteenth error assigned (see Twelfth error assigned).

(14). Fifteeenth and Sixteenth errors assigned (fols. 198–9, 203). The Court left to the jury the question of defendant's liability for Gerraghty's neglect in the performance of an employee's duty in operating the fall, as to which the defendant had performed its entire duty. We have considered this at length under the *First Point*.

(15). Seventeenth error assigned (fol. 74). There being no evidence that Craven was not in charge at the time of this conversation between O'Brien and Gerraghty as to the fall, and it being conceded that if Craven was in charge, such notice to Gerraghty was not notice to the defendant (see charge fol. 196), the testimony was incompetent. It was not within the province of

either Court or jury to assume that Craven was not in charge at the time.

Last Point.—The judgment should be reversed.

R. D. BENEDICT,
FRANK D. STURGES,
Of Counsel.

OWEN & GRAY,
Attorneys for Plaintiff in Error.

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Last Point. The judgment should be reversed.

R. D. BENEDICT,
FRANK D STURGES,
Of Counsel.

OWEN & GRAY,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

THE CUNARD STEAMSHIP COMPANY, Limited,

Plaintiff in Error,

against

PATRICK CAREY,

Defendant in Error.

Supplemental Brief in reply to Brief for Defendant in Error.

On examining the brief of the counsel for the defendant in error, we find in it errors of sufficient gravity to warrant us in calling attention to them by a supplemental brief.

First.—Counsel for the defendant in error are forced to adopt theories in respect to the two important features of the case, viz.: (1), the conduct of the defendant in error, and (2), the cause of the injury,—which are wholly at variance with uncontradicted testimony, and the latter of which is directly contrary to the charge of the Court and the theory upon which the case was submitted to the jury.

I.—The brief, at the foot of page 4, states that Carey, "when struck by the falling tub, was at his post of

"duty *at the edge of the hatch* * * * in the inshore "side."

And again, on page 5: "Although obviously in pulling "in a descending empty tub it would sometimes be "necessary for him to pass under the hatch, there was "no evidence that he was there when struck."

And counsel argue: "If he had been immediately "under the hatch, it would have struck him on the "head."

This statement is again repeated on page 13.

(*a*). As matter of argument, in view of what we know of the natural law of gravity, it would seem to be certain that the tub could not have hit Carey, unless he had been under the hatch. Bennett was steadying the rope as the tub came up, and says he saw the tub three or four feet below the coamings (fols. 68–69). When the tub fell, therefore, it fell within the hatch, and Carey must have been there, or it would not have hit him.

Again, his natural position when about to pull the descending tub from the outshore side to the inshore side would be leaning forward, in which position the lower part of his body being nearer the inshore side of the hatch which he had just left, would be under the falling tub which had ascended on that side.

(*b*). But we are not left to argument. Carey's evidence is that he was not at the edge of the hatch when hit, but under it.

His counsel ask the question: "Where did your duty require you to be?" and takes the answer, "Right by the edge of the hatch" (fol. 40), as evidence that that was his actual position when struck; but this is incorrect. He ignores the rest of Carey's evidence (fol. 40).

> "After hooking on a full tub, and sending it up, "and *going* to take in the empty tub that was "coming down, all of a sudden the hatch got "suddenly dark * * * and all of a sudden a

"tub full of coal came down on top *of* me *where* "*I stood* and broke my leg."

And at fol. 44:

"And *I went to pull in an empty tub*, so I "did. * * * *I crossed the hatch* to pull in the "empty tub that was there.

"Q. I want to know where you stood at the "time you sent up the full tub?"

"A. *I didn't stay there at all; I went to pull in* "*the empty tub.*"

And again, at fol. 45:

"Q. And were you going to pull that tub down "to the inshore side of the ship, where the men "were working?"

"A. Yes, sir."

(*c*). Counsel say (p. 6): "Unless it is held to be con- "tributive negligence to be at his post of duty, Carey "was injured without any fault of his own."

If Carey had not been in the hatch, this remark would be strictly true, but as he was *under it*, unless it is held not to be contributive negligence to go into a place of danger contrary to orders, Carey was not injured without any fault of his own, but by his own negligence.

II.—The theory of the counsel for the defendant in error as to the cause of the injury was, and is, that the *rope broke* by reason of being *worn or fagged out;* and throughout the brief repeated use is made of these expressions.

On page 7 of the brief counsel sum up: "He (Carey) "did not assume the risk of the breaking of the rope at "the place where it was worn out, where several yarns "were worn off, and where it was fagged out."

(*a*). They discredit the idea of the rope having been spliced, and of the injury having occurred through the drawing of the splice, and say, at page 14: "The word

" spliced was frequently used by the defendant's wit-
" nesses, which tended to produce the impression that
" this was a spliced rope, and that it untwisted and
" drew apart at the place where spliced. *It was ex-*
" *tremely doubtful whether this was a spliced rope.*"

How can such a claim be reconciled with the language of the Court in its charge to the jury? The Judge said (fol. 192): "It may furthermore, in my opinion, be con-
" sidered as a fact that the rope *was a spliced rope*, and
" that the injury happened *by the untwisting and draw-*
" *ing apart of the portion of the rope which was spliced.*"

This was equivalent to the instruction that the evidence would not sustain any other cause for the injury, and the jury were bound to accept that instruction and find a verdict in accordance. If they did not, the Court was bound to set the verdict aside. The case was disposed of at the trial upon this basis, and surely it must be disposed of now on the same basis.

If the Court did not "think it desirable to balance the testimony on that point" (fol. 192), the counsel should not have thought it desirable to aver the contrary.

(*b*). Counsel say in the brief (page 16), "There is no evidence that it (the rope) did untwist after Gerraghty put in the turns." But the Judge charged the jury that the injury happened by the untwisting and drawing apart of the portion of the rope which was spliced (fol. 192). Such must be taken to be the fact now.

Second.—Counsel for the defendant in error also in many instances either entirely misunderstand the uncontradicted testimony, or purposely omit to give such portions as materially qualify their statement of facts. We, therefore, are warranted in making reference to their brief in these respects.

I.—Counsel claim (page 20) that "some one should have been appointed and retained to watch the rope."

Some one *was* appointed for that very purpose. "I "told him (O'Brien) to look out for that fall, and if the "turns should come out of that fall again for to take "it off and put them in" (fol. 134).

But in his watching the rope he was not the representative of the master, but a servant. No rule of law requires that a master should perform the duty of watching the appliances which he furnished while they are in use to see that they are carefully used. That is the duty of the servant who uses them.

II.—The portion of the charge excepted to on page 24 of the brief was manifestly a misprint. The charge is at fol. 192. Instead of the words "and knew," it should read "when they know."

If the Judge had charged that Craven "*knew or ought to have known*" of the unsafety of this fall, it would have been a manifest error.

III.—The brief, at page 26, says, that the "injury did not arise in consequence of any negligence in the use of the rope."

But if the rope became *untwisted* and *O'Brien* did not stop his drum to put the turns in, what is that but neglegent use of the rope? Not doing to the rope what he ought to have done is just as much a negligent use of it as doing something to it which he ought not to do.

IV.—The brief (page 27) quotes the language of this Court in the *Ross* case as to the conductor of a railway train, in the management and operation of the train, as justifying the refusal of the Court to charge as requested, "that in the management and operation of the hoisting apparatus Gerraghty and O'Brien were fellow-servants of the plaintiff."

But there is no analogy between the cases, although the same words are used. The analogy to be drawn from railroad business would be, not the management and

operation of the train, but of the engine.

Surely this Court never intended to hold that in the management and operation of the engine, the engineer and the firemen represent the company and are not fellow-servants with the brakemen. On the contrary, it is expressly said in that case that "the firemen, the brakemen, the porters and the engineer are fellow-servants" (112 U. S., p. 390), that is, the fireman and engineer in the management and operation of the engine, and the brakeman in the management and operation of his brake, are fellow-servants with the porter. And so, as it seems to us, in the management and operation of this machine, Gerraghty and O'Brien were fellow-servants of the plaintiff in the business of hoisting the coal.

V.—The brief says (page 29) that "the danger of falling tubs, in consequence of the parting of defective ropes supplied by the master, was a hazard not naturally to be anticipated."

The hazard naturally to be expected was the hazard of *anything falling*, and counsel in their brief, at page 29, give an instance of this in "falling lumps of coal." It makes no difference what led to the falling, if danger from anything falling was incidental to the work. The falling might be the result of "defective ropes supplied by the master," or it might be the result of good ropes supplied by the master being allowed by the servants to become defective by careless use, or it might be the negligent use by servants of ropes which were always good; but there was always danger against which the master could not guard by diligence on his part, except by directions to the servants not to stand under the hatch; whereas, the servant could guard against the danger by obedience to those directions.

VI.—Counsel refer to the rope in question having been used *seven* months, which is longer than the usual time (page 2.)

The testimony shows that it was purchased April 13th, and was not put in use until *two weeks* after that time (fol. 130), and the accident happened November 3d, This is a few days over six months.

VII.—They say that when the rope was spliced, about a week before the accident, it was chafed and worn, but omit to state that the same witness who spliced the rope says that those worn parts were then cut out (fol. 119).

VIII.—They say that it is unsafe to use a spliced rope that has to pass through *blocks* as this one did.

The uncontradicted testimony shows that this rope, the part that was spliced, passed through but *one* block, if through any (fols. 97, 152), and that was a large block (fol. 158).

IX.—They say that dipping the rope in water, if the rope is bad or old, causes it to fag quicker, and refer, at pages 3 and 11, to the testimony of Burdett at fol. 92, and Hawkins at fol. 95, in support: but they omit to refer to the testimony of these witnesses, which is directly in conflict with this claim (see Burdett, fol. 92, and Hawkins, fol. 95).

"Q. If a rope runs through pulleys, would it chafe "any more by being wet than it would by being dry?

"A. No; *the wetter it is the longer it will hold.*"

X.—Counsel state, at page 9, that "there was no evi- "dence of the intervention of any *unusual or extraordi-* "*nary* cause to produce that defective condition between "the time the fall was rigged and the time the rope "parted, an interval of only three hours."

We agree with them that the untwisting of the rope was not the result of anything *extraordinary or unusual*, but was, on the contrary, a usual incident to the operation of the rope.

XI.—Counsel misstate the testimony of O'Brien that Gerraghty, when spoken to the *second* time, took the rope away and dipped it in the water. O'Brien expressly says, at fol. 74, that he does not know what Gerraghty did when he spoke to him the second time.

XII.—Counsel also refer to the rope having disappeared (page 17); but the Court charged that no injurious conclusion by reason of such fact could naturally be drawn against the company (fol. 199).

Reply to Supplemental Brief of Defendant in Error.

The counsel for the defendant in error have furnished a supplemental brief in answer to our brief.

We beg to present the following considerations in reply.

FIRST.

The supplemental brief (page 1) speaks of the various circumstances which made it dangerous to stand under the hatch, as being "the dangers" to which Cary was exposed if under the hatch. It studiously omits *the* danger. The danger was *danger of injury from something falling on him.* It made no difference what were the particular circumstances out of which the fall of any particular thing arose. The employer had directed him not to be where he would be exposed to any injury from the fall of coal or tubs, or anything else. Obedience to that direction was all that was required on plaintiff's part to ensure his safety.

Plaintiff's claim is, that although he was under the hatch he would not have been injured but for negligence

of his employer as to the rope, and that therefore he did not contribute to the injury (p. 3). But even if we grant that there was negligence of his employer as to the rope, it is equally apparent that he would not have been injured *but for his being under the hatch* contrary to directions. The same reasoning, therefore, which the brief puts forward as showing that the plaintiff's presence under the hatch did not contribute to the injury, would also show that the employer's negligence as to the rope did not contribute to the injury, which is absurd.

The true proposition is that if there was negligence on the part of the defendant as to the rope, and if there was negligence on the part of the plaintiff as to being under the hatch, then, inasmuch as in the absence of either fact there would have been no injury, it is a case of contributory negligence.

SECOND.

But the brief proceeds to argue that there was no negligence on the part of the plaintiff in being under the hatch. It says: "It has never been held that being in a dangerous place is negligence *per se*" (p. 3). But being in a dangerous place *contrary to orders* is negligence *per se*. The authorities cited holding that a man, who is required by his duties, or by orders, to be in a dangerous place, is not negligent merely in being there, are foreign to this case, for Cary's being there was unnecessary and contrary to orders.

The counsel have seized upon the only bit of evidence which furnishes any support to their claim that Cary was "necessarily under the open hatch," in the evidence of Gerraghty which they quote on page 5. But it is plain that what Gerraghty meant was that "*if* he went to catch the empty tub (which was coming down on the opposite side of the hatch) he could not do it without stepping under the hatch." Now, take the uncontra-

dicted evidence of the plaintiff himself that there was another man on the opposite side of the hatch "doing the same work" as himself (fol. 40), and of Craven that where there are "two men, one to attend to each tub," it is not necessary for either man to step out and take the tub on the *opposite* side, and it is plain that, although it might be necessary for Cary, *if* he did go to take the opposite tub, to step under the hatch, yet it was not only not *necessary for him to take the opposite tub*, but his taking it was doing the business of the man opposite him, and was contrary to the express orders not to stand under the hatch when a draft was going up.

It, is, therefore, not the fact that Carey was "necessarily under the open hatch."

And in support of our proposition, that, if he was unnecessarily under the hatch, whether against express orders or not, that was negligence on his part, we desire to add to our former authorities the following:

> "When the danger is open to the observation of every one, so that the party, when he is invited to go there, must be held to know the risks, then, if he chooses to go there, he assumes the risks himself."
>
> Kresanowski *vs.* Northern Pacific R. R., 18 Fed. Rep., 235.

> "If the danger was equally known to both parties, it could not be said that he was free from contributory negligence."
>
> English *vs.* Chic. &c. R. Co., 24 Feb. Rep., 910.

> "A man has no right to thrust himself forward into a dangerous position and say, 'If I am hurt I shall go to the hospital and be taken care of and recover damages.' He has got to take care of himself."
>
> Cunningham *vs.* Chic. &c. R. Co., 5 McCrary, 472.

THIRD.

The supplemental brief still contends, as the first one did, that this rope was not spliced, and that the jury was not bound to treat the case on the theory of a spliced rope. It even claims that the Trial Judge left it to the jury to decide, as a question of fact, whether it was a spliced rope (p. 17).

Now, it is true that the Trial Judge did say, "I do not presume to decide upon this question of fact." But it is equally true that the question of fact, of which he spoke, was *not the question, whether the rope was spliced.*

Having said to the jury that "it may be considered as a fact that this was a spliced rope," the Judge then stated to them two positions which the plaintiff took; and, after discussing the first one, he proceeded to the second, saying, "I do not presume to decide this question of fact *which I have just submitted to your consideration.*"

The words in italics the supplemental brief (p. 17) omits to quote, but states that by this language the Trial Judge intended to leave to the jury the question whether the rope was a spliced rope. The counsel may have been misled into the belief that this was so. But this Court will see that the question of which the Judge spoke was whether this *spliced* rope was unsafe *when it was selected from the store-room.*

FOURTH.

The plaintiff's counsel concedes (supplemental brief, p. 8) that, if our proposition on p. 20 of our brief was correct, we were entitled to have a verdict directed in favor of the defendant, but they say that "the plaintiff was guilty of none of all those things." Let us see.

1. We say the plaintiff was "heedless of apparent risks." Counsel answers that the danger of a defective rope was not apparent.

The risk which was apparent was the risk of being hurt if anything fell down the hatch, no matter what caused such fall.

2. We say he was "disobedient of express directions." Counsel denies it.

He had been told "not to be standing under the hatch when a draft was coming up." He was under the hatch when a draft was coming up.

(The quibble on p. 7 as to the word "standing" does not demand an answer but we will call attention to the fact that plaintiff himself says, "The tub came down on me *where I stood*" fol. 40).

3. We say he was "regardless of repeated warnings." Counsel does not undertake to contradict this.

4. We say he interfered with the duty of the man opposite him. Counsel says he did not, for there was no man opposite.

But the plaintiff testified that there was another man *on the opposite side of the hatch doing the same work*, and that that was Henretty. And the counsel really seem to think that the fact that the defendants *did not call Henretty as a witness* wipes out of the case this evidence of his own client (supplemental brief, p. 9) and justifies them in the assertion that "there was no man opposite to him performing duties similar to his."

We submit that the answer of the plaintiff's counsel to the facts of our proposition is insufficient; and we claim the benefit of their concession that on those facts the Court should have directed a verdict for defendant.

FIFTH.

The contention of plaintiff's counsel, on page 11 of the supplemental brief, is nothing but a quibble. They surely understand that the coming out of the turns of the rope is a progressive process, not injurious to the strength of the rope *when it begins*, but becoming so if allowed to continue. The stopping the use of the rope before that

process has reached the dangerous phase, is an incident in the *use of the rope* by the employee.

They say that "there is no evidence in this case that the fall was improperly or negligently operated" (p. 24.)

We answer that there is no conflict on the evidence, but that when the turns began to come out the second time, O'Brien continued to use it instead of "taking it off" as he had been directed to do, and that such operation of the fall was both improper and negligent.

SIXTH.

As to the claim on page 17, that this rope was (1) not spliced (2) not in a good condition where it *was* spliced (p. 23), we only desire to refer again to the Trial Judge's statement to the jury that it was to be taken as a fact that it was a spliced rope, and to refer also to our brief (pp. 22–23) where the uncontradicted evidence is given as to the condition of the rope when *it was furnished.*

We say uncontradicted, because the evidence of the witnesses who saw it after its hours of use and after its parting, does not contradict the testimony as to its condition when it was furnished.

SEVENTH.

The substance of the contention of plaintiff's counsel is (1st), that if a master furnishes to his employees material which is safe when furnished, but which by use may become unsafe, so as to need repairs, and which the employee does use till it becomes unsafe, such use by the employee is a breach of the duty of the *master;* and (2d), that, if the employee is told to stop the use of the material if he sees it about to become unsafe, and to put it back to the condition in which it was when it was supplied, his failure to do so is a breach of the *master's* duty.

This is nothing less than holding that the master must ensure the safety *at all times* of the material which he furnishes. But the law has hitherto been that the master was only called on to ensure that the material was safe *when he furnished it.*

The counsel states our claim as to O'Brien to be that he was to watch the rope and see that the turns did not come out, or if they did, to put them in again (p. 12 D.) and they argue that putting the turns in was keeping the rope in repair, and, therefore, O'Brien, in putting in the turns, or failing to put them in, represented the *master.*

They have overlooked and omitted one material element. Gerraghty's evidence was that he told O'Brien "to look out for that fall, and if the turns would come out of that fall again *for to take it off* and put them in again" (fol. 135).

Now, whether O'Brien represented the master in putting the turns in or not, in taking off the fall he certainly would be doing the work of an employee in the use of the rope. His failure to stop the use of the rope and to take it off, was the negligence of an employee.

The plaintiff's claim comes to this—that a master is required not only to furnish safe material, but to stand by while it is being used and see that it does not become unsafe. And this was substantially what the Trial Judge gave the jury to understand when, after stating that the plaintiff claimed that it was Gerraghty's neglect if he "*did not return to watch* the rope," and that the important duty of the hour *was to see* that the rope did not untwist, and that "Gerraghty had no business to abandon the oversight of the rope in the condition in which it was when he saw it," he then told them that if Gerraghty "ought to have attended to himself," and did not, and the accident happened by reason of it, the plaintiff had "made out his case" (fol. 198).

But the law, as we have already shown, is otherwise.

We add the following authorities.

"The corporation is not to be held as guaranteeing or

" warranting the absolute safety under all circumstances " of the machinery or apparatus which may be provided " for the use of employees."

Hough *vs.* Railway Co., 100 U. S. 218.

" The duty which the master owes to his servants is " to provide them with safe tools and machinery where " it is necessary. When he does that, he does not, how- " ever, engage that they will always continue in the " same condition. Any defect which may become ap- " parent in their use, it is the duty of the servant to ob- " serve and report to his employer. The servant has " the means of discovering any such defects which the " master does not possess. It is not negligence in the " master if the tool or machine breaks, whether from " an internal original fault, not apparent when the tool " or machine was at first provided, or from an external " apparent one produced by time and use, not brought " to the master's knowledge. These are the ordinary " risks of the employment which the servant takes upon " himself."

Baker *vs.* Alleghany R. R., 95 Penn., 211.

" The rule is that the master does not owe to his ser- " vant the duty to furnish the best known or conceivable " appliances. He is simply required to furnish such as " are" (not which will always remain) " reasonably safe " and suitable, such as a prudent man would furnish if " his own life were exposed to the danger that would " result from unsuitable or unsafe appliances."

Marsh *vs.* Chickering, 101 N. Y., 400,

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FRANK D. STURGES,
Counsel.

119-245

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Supreme Court of the United States.

THE CUNARD STEAMSHIP COMPANY (LIMITED),
Plaintiff in Error,

AGAINST

PATRICK CAREY.

Brief of Appellee.

FACTS.

On the 3d of November, 1880, Patrick Carey, the defendant-in-error and plaintiff below, was a 'longshoreman in the employ of The Cunard Steamship Company, the plaintiff-in-error and defendant below, in the hold of the steamship *Batavia*, which was owned and in use by that company (folios 39, 12).

His duties in the hold were to hook and unhook tubs of coal on and from a fall supplied by the defendant below for the purpose of unloading Liverpool coal from the hold of the steamer (fol. 39). While so employed at his post of duty, the rope of the fall which was hoisting a full tub of coal broke; the tub fell upon his left leg causing a compound comminuted fracture of the thigh bone (fols. 40, 49). He was carried to St. Vincent's Hospital (fol. 42), where he remained for about five months (fol. 42), after which he was taken home in a carriage, where he was attended by a physician and surgeon for about twenty

months thereafter (fols. 42, 51, 52, 38). His injuries were of a very serious, dangerous, painful and permanent character. A thigh bone was broken in a number of pieces, the ends of which projected out through the flesh, which was bruised and lacerated to such an extent that the surgeon's hand could be passed through the leg from one side to the other (fol. 49). A large package of bone chips taken from the leg was put in evidence on the trial (fols. 42, 52). After the healing of the leg, which became four and a half inches short, deep depressions remained and will remain through life (fol. 52). It is impossible to bend the leg or stand upon it, and Carey is permanently injured and incapacitated (fols. 52, 57). The details of the various surgical operations, the opinions as to the necessity of amputation, the pain through which he passed and will pass in the varying conditions of the weather, are detailed in his testimony and that of the surgeons who attended him (fols. 41, 42, 49, 61). It was only by marvelous surgical skill that his life was saved.

The rope the breaking of which caused the plaintiff's injuries was purchased and put in use for a coal fall by the company on the 13th of April, 1880 (fols. 118, 119), about seven months prior to the time it broke (fol. 39). The testimony of the witnesses for the company disclosed the fact that the length of time customarily deemed safe to use a rope was five or six months (fol. 101); so that Carey was injured by the breaking of a rope which was being used nearly a month after the expiration of the usual time for such use. This rope was a part of the usual hoisting apparatus operated by steam power, and was rove through a number of blocks running from the ship's hold through these various blocks attached to a gaff or derrick over to a drum worked by an engine on a scow at the ship's side (fols. 71, 73, 97). There was testimony on the part of the witnesses of the defendant below, that this rope was spliced about a week before the accident (fol. 119), that at that time it was chafed and worn (fols. 119, 120, 129), and that after that it was used only twice before it broke (fols. 119, 129). The man who rove the fall, and others whose attention was directly called to the rope, saw no splice in it (fols. 177, 73, 134). If the rope was

spliced, the testimony of expert witnesses of the defendant below shows that it is unsafe to use a spliced rope which has to pass through blocks as this one did (fols. 115, 129), for the manifest reason that the friction will wear down and chafe the spliced part, and cause untwisting and drawing of the splice (fol. 125). About eight o'clock on the night of the injury two hours and a half before the rope broke (fols. 73, 40), it was in such an alarming condition in that part which was visible on the scow, as to arrest the attention of the men there stationed (fols. 71, 73, 148). At that time it was chafed, worn and fagged out over a length of five or six feet, the centre of which was the worst part (fol. 73). One of these men, John O'Brien, then called the attention of Christy Gerraghty, the foreman, to its dangerous condition (fols. 73, 74, 75). At about half past nine Gerraghty's attention was again called to it (fols. 74, 134, 148); he then took the fall off the drum and put some turns in it, throwing that part into the water to steep it (fols. 75, 135). He saw no splice in the rope (fol. 134). The effect of this operation on a rope, if good, is to give it temporary strength (fols. 75, 103, 114); but if bad or old, causes it to fag quicker (fols. 75, 92, 95). Shortly after the rope carried away (fol. 75), and the tub of coal it was hoisting fell upon Carey's left thigh (fols. 40, 54).

The various agents and officers in charge were as follows: The superintendent of the dock was Mr. Story, who was not present at any time on the night in question (fols. 39, 105). Next in rank to him was Patrick Craven, who was foreman of the dock (fols. 39, 42, 96), who had power to hire and discharge men, and superintend the work of both men and gear (fols. 96, 111, 112). On the night in question he was sick, and was round the dock for only about half an hour, leaving for his home at five minutes after nine (fol. 99). In Craven's absence, Christopher Gerraghty had full charge of both men and gear (fols. 105, 112). While Craven did not leave until nine o'clock, Gerraghty assumed full control at a little after eight o'clock, the time when his attention was first called to the rope by O'Brien (fols. 73, 14-), owing to the fact that Craven was then disabled, being sick and lying down in his room (fol. 99).

The case was submitted to the jury under instructions from the Court, and a verdict returned for the plaintiff below for fifteen thousand dollars damages (fol. 203).

Twenty-three exceptions were taken, which will be considered in groups according to the nature of the questions involved.

POINTS.

On Exceptions to Denials of Motions to Direct Verdict for Defendant Below.

First.

ON THE EXCEPTION TO THE DENIAL OF THE MOTION TO DIRECT A VERDICT FOR DEFENDANT BELOW AT THE CLOSE OF PLAINTIEF'S CASE(folio 95).

The grounds of the motion were:

FIRST.—Contributory negligence of the plaintiff.

SECOND.—That the evidence failed to establish negligence on the part of the defendant.

THIRD.—That the injury was caused solely by the negligence of a fellow-servant of the plaintiff.

The denial of this motion was not error.

A.

ON CONTRIBUTORY NEGLIGENCE.

There was no contributory negligence on Carey's part. When struck by the falling tub he was at his post of duty at the edge of the hatch in the hold (folio 40), in the wing

of the ship on the inshore side (folio 44). At the time the coal was nearly all discharged, only six or eight tubsfull remaining (folio 40) in this inshore wing (folios 44, 45). The tub that struck him was, before it fell, being guided in its ascent by a man stationed on the steerage deck on the inshore side (folios 68, 69), and was very near that deck when the rope parted (folio 68). The distance between that deck and the bottom of hold where Carey was standing was about twenty feet (folio 47). He was found after being knocked down on the side of the hatch where the men were shoveling at the time (folio 64) no men being then at work on the other side (folio 44). There was an immaterial variance on the question as to whether it was offshore or inshore between Carey and a witness by the name of Carroll, Carey thinking it was inshore and Carroll that it was offshore (folios 44, 64), owing probably to the fact that Carey remembered that the ship headed toward the street (folio 44), while Carroll supposed from the defendant's counsel that it faced toward the river (folio 64). Bennett, the man stationed on the steerage deck, corroborated Carey's memory in his testimony that he was guiding the ascending tub on the inshore side before the rope parted (folios 68, 69). But whichever side it was, it was where Carey and the shovelers were working (folio 64). Carey had guided the full tub to the edge of the hatch and sent it up; had grasped the descending tub and was guiding it to the shovelers in the wing when he was struck (folios 44, 45). Although obviously in pulling in a descending empty tub it would sometimes be necessary for him to pass under the hatch, there was no evidence that he was there when struck.

From the direct facts established the mind is forced to the conclusion that Carey was struck by the falling full tub he had sent up attached to the rope which broke while he was guiding the empty descending tub in the inshore wing at the edge of the hatch. If he had been immediately under the hatch it would have struck him on the head. As it was, he was struck on the side, on the lower part of the left thigh (folio 54).

There is no evidence that he was not using all the care and caution which a prudent man would exercise under

the circumstances. Even if the evidence justifies the inference that he was immediately under the hatch at the time when struck, the same evidence shows positively that he must have been there in the performance of his duty. There being only a small quantity of coal remaining in the hold (folio 40) at the time, which obviously would be far back in the wing, it would be necessary for Carey to grasp a descending empty tub before it got too far down in order to give it the proper momentum in the direction of the shovelers. If he waited until the loaded tub was far up the empty tub might land on the bottom of the hold and he could not get it where he wanted it The weight of an empty tub was about from 175 to 200 pounds (folio 40). Unless it is held contributive negligence to be at one's post of duty Carey was injured without any fault of his own.

This Court has held contributory negligence to be a question of fact for the jury.

Hough *vs.* R. R., 100 U. S., 213.
R. R. *vs.* Jones, 95 U. S., 439, 441.

In the latter case this Court says:

"Negligence is the failure to do what a reasonable and "prudent person would ordinarily have done under the "circumstances of the situation, or doing what such a "person under the existing circumstances would not have "done. One, who by his negligence has brought an "injury upon himself cannot recover damages for it. "Such is the rule of the civil and common law. A plain-"tiff in such a case is entitled to no relief. *But where the "defendant has been guilty of negligence also, in the same "connection, the result depends upon the facts.* The ques-"tion in such cases is: 1. Whether the damage was "occasioned entirely by the negligence or improper con-"duct of the defendant; or 2. Whether the plaintiff him-"self, so far contributed to the misfortune by his own "negligence or want of ordinary care or caution, that but "for such negligence or want of care on his part the "misfortune would not have happened. In the former "case the plaintiff is entitled to recover. In the latter "he is not."

In the case at bar it cannot be said that Carey was doing anything, or omitting to do anything, which a reasonable or prudent man would ordinarily have done or not done under the circumstances in which he was placed. He was doing his duty. Negligence is a failure to do one's duty. The misfortune was occasioned entirely by the negligence and misconduct of others.

Not a Risk.

Nor can it be claimed that the doctrine of constructive negligence should be applied. The injury which the plaintiff sustained did not arise out of any risk which the plaintiff assumed when he entered the employment of the defendant.

"The risks assumed by a servant are perils which he is "likely to know and against which he can as effectually "guard as the master. They are incident to the service "and can be as distinctly foreseen and provided for as "any other. He does not assume risks of perils or "hazards against which he may be guarded by proper "diligence upon the part of the master."

Hough *vs.* R. R. *ubi sup.*

Carey did not assume the risk of an injury resulting from defective machinery. He did not assume the risk of the breaking of this rope at the place where it was worn out, where several yarns were worn off, and where it was fagged out, for the reason that he was in a place where he could not know of it nor provide against its dangers. The defendant's counsel conceded (folio 76) that the defective part of the rope did not descend into the hold within Carey's sight.

(*B.*)

On Defendant's Negligence.

The second ground of the motion to direct a verdict was "that the evidence fails to establish negligence on the

part of the defendant." The evidence of defendant's negligence was overwhelming. It will not—it cannot—be contended that this rope was a safe one or in a safe condition at that time. *After it gave way* the ends, to use some expressions of the witnesses, "looked like a whisp broom or something that would be worn out" (fol. 47). "The strands apart from each other" (fol. 49), "and scattered" (fol. 62, 63), "looked like an old swab" (fol. 68), "fagged out" (fols. 70, 78, 79). Like any other rope when it breaks one strand would be a little shorter than the other, and the yarns were "fagged out" (fols. 78-79). The strands were separated from each other irregularly over a distance of from six inches to three feet (fols. 86, 49, 70). "It "wasn't a clean break across so as to cut it with a knife "or such a thing as that; but it pulled right apart and "came scattered down in the hold. The end of the rope "was not twisted up, the strands were separated" (fol. 63). *Before it gave way* it was in such a condition as to arrest the attention of O'Brien, who was stationed at the drum. In his language, "It was chafed about from 5 to 6 feet "along about the centre of that was the worst part." "There were several yarns worn off; it was fagged out "considerably" (fol. 73). From these descriptions there can be no doubt that the rope was in a deplorably unsafe condition. It broke at the place naturally to be expected, viz.: the weakest point—the centre of the five or six feet where it was chafed, that being the worst part (fol. 73). The witnesses all agree that there was about three feet of fagged out ends after the rope gave way (fols. 86, 49, 70), which establishes the fact that it broke in the centre of the five or six feet which O'Brien described as the worst part (fol. 73). Here was evidence of an unsafe rope being used by the defendant, evidence that it broke, evidence that the plaintiff was injured thereby. This established at least presumptively the negligence of the defendant.

Stokes *v.* Saltonstall, 13 Peters, 181.
Transportation Co. *v.* Downer, 11 Wall., 130.

This evidence standing alone established a clear case,

and was sufficient to cast upon the defendant the burden of proving proper care on its part.

It was implied in the contract between the defendant as master and the plaintiff as servant, that the former should supply the physical means and agencies for the conduct of the business in which the plaintiff was engaged, and that in selecting such means it should not be wanting in proper care. It was the defendant's duty to observe all the care which prudence and the exigencies of the situation required; such care as was fairly commensurate with the perils or danger likely to be encountered. Its duty was discharged when, *but only when* its agents, whose duty it was to supply the instrumentalities, had exercised due care as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees.

Hough *vs.* R. R., *ubi sup.*

Wabash R. R. *vs.* McDaniels, 107 U. S., 454.

Under the foregoing rules, as held by this Court, the evidence was sufficient to justify the submission of the case to the jury on the question of defendant's negligence. The inference was irresistible that proper care had not been exercised in the rigging of that fall with that defective rope. There was no evidence of the intervention of any unusual or extraordinary cause to produce that defective condition between the time the fall was rigged and the time the rope parted, an interval of only three hours. Even without the aid of the testimony of expert witnesses (fol. 77), the lay mind would naturally believe that that rope was in a defective and unsafe condition when it was selected for that night's work. It would require considerable evidence to remove the natural presumption that it could not have deteriorated so much within so short a time by the usual and ordinary wear and tear, and that therefore its condition must have been apparent to ordinary observation when it was selected. Hence the jury would have been justified in finding that proper care was not exercised in supplying that rope and rigging the fall.

But conceding that the rope was in a safe condition when selected that night, the evidence shows that it after-

wards became unsafe and dangerous to an alarming extent. It needed repairing. The duty of repairing and maintaining buildings, machines, &c., is the master's, and he is directly liable for the negligence of his agents acting in his behalf. If the master knows, or in the exercise of due care *might have known*, that his structure or apparatus were insufficient either at the time of providing them, *or at any subsequent time*, he fails in his duty.

Hough *v.* R. R., *ubi sup.*

For over two hours before the rope parted its defective and dangerous condition was so apparent as to arrest ordinary observation. If the defendant did not know, it *ought to have known it.* It was somebody's duty to repair that rope, or replace it with a better and safer one. It would be a violent presumption which the defendant itself would hardly care to allow, that no one in defendant's employ was charged with that duty. Whatever agent was entrusted with its performance stood in the place of the defendant, and was guilty of neglect.

So if the plaintiff's case had rested here there would have been sufficient evidence to justify the denial of the defendant's motion to direct a verdict on the ground claimed that the evidence failed to establish negligence on its part.

Notice to Defendant.

But the evidence of the plaintiff went further than this, and showed actual notice to Gerraghty, the foreman, whose duty it was to either repair the rope or replace it with a safer one. The attention of Gerraghty was twice called to the dangerous condition of the rope, within two hours before it broke. O'Brien testified: "I spoke to Mr. Ger- "raghty, and told him that the rope looked bad—looked "chafed—looked as if it wouldn't last much longer to hoist "with * * * * He told me to go ahead with it longer, "and continue to hoist, and I did so. Then he came down "again about an hour or so afterwards, and I spoke to "him again about the rope; it was then getting worse, "and I told him that it looked worn, and I was kind of

"afraid to hoist any longer—felt timid like; I was afraid "there was going to something happen—that the rope "was going to carry away, or something, and might hurt "some one; I felt that way; I told him that I felt afraid "it might carry away" (fol. 74). Gerraghty was the foreman to whom the notice was properly given (fol. 90). He was the only foreman there that night, and he always had charge of coal gangs and the operation of the machinery (fol. 91). Here was actual notice to the agent to whom the defendant had delegated its duty of maintaining secure apparatus for the use of the servants.

Hough *v.* R. R., *ubi iup.*
Pantzar *v.* Mining Co., 99 N. Y., 368.
Corcoran *v.* Holbrook, 59 *Id.*, 517.

What care did Garraghty exercise in the performance of this duty? The first time O'Brien called his attention to the rope, he told O'Brien to go ahead with it longer and continue to hoist (fol. 74). The second time, over an hour after, when spoken to again, he took the rope away and steeped it, *i. e.*, dipped the bight of it that was bad in water (fol. 75). The testimony of the plaintiff's expert witnesses in regard to the steeping, was that while it might make a good rope a little stronger for a few minutes, perhaps, if it was an old or worn rope it would wear just the same and fag quicker afterwards (fols. 75, 85, 92, 95). In the opinion of the same witnesses, what should have been done was to change the rope for a new and better one (fols. 88, 92). One witness, in answer to the question: "If "a rope is chafed, would dipping that rope in water have "a tendency to strengthen or weaken it?" quaintly replied: "No, sir; that chafe is there; it don't do it any "good, sure; that chafe is there; no use to doctor that, "only to put a new one in its place" (fol. 92).

It is clear, therefore, that the plaintiff's case disclosed evidence of gross neglect on defendant's part.

(*C.*)

NO NEGLIGENCE OF FELLOW-SERVANTS.

The third ground of the defendant's motion to direct a verdict in its favor at the close of the plaintiff's case was

"that the injury was caused solely by the negligence of a "fellow-servant of the plaintiff." In no aspect of the plaintiff's case can it be successfully contended that the plaintiff's injuries were caused *solely* by the negligence of a fellow-servant. There was no evidence that any of the workmen committed or omitted any act, or in any way contributed negligently or otherwise to the accident which resulted in Carey's injuries. Nothing which O'Brien did was negligent. He did all he could to avert the casualty. Even if Garraghty should be regarded as a fellow-servant instead of the representative of the defendant, the injury to the plaintiff could not be said to have been caused *solely* by his negligence. The fact would still remain that a defective and dangerous rope had been supplied by the defendant.

Where the master furnishes defective or inadequate machinery for use in the prosecution of his business, he is not excused by the negligence of a servant in using the machinery, from liability to a co-servant, which could not have happened had the machinery been suitable for the use to which it was supplied.

Grand Trunk R. R. *vs.* Cumming, 106 U. S., 700.
Cone *vs.* R. R., 81 N. Y., 206.
Ellis *vs.* R. R., 95 *id.*, 546.
Stringham *vs.* Stewart, 3 East. Rep., 73.

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As has already been shown, the evidence justified the conclusion that the rope was in a defective condition when work was commenced that night, and it certainly was defective when Gerraghty's attention was called to it, which establishes negligence on defendant's part. If it were some one other than Gerraghty's duty to repair the defect, and Gerraghty was merely a fellow-servant, then his negligence merely contributed to the casualty, which therefore cannot be said to have been caused *solely* by his negligence.

The defendant's motion at the close of plaintiff's case to direct a verdict in its favor was properly denied, and the defendant's exception thereto was not well taken.

Second.

ON THE EXCEPTION TO THE DENIAL OF THE MOTION TO DIRECT A VERDICT FOR DEFENDANT BELOW, AT THE CLOSE OF ALL THE EVIDENCE ON BOTH SIDES (fol. 183).

The grounds of this motion were the same as of the motion to direct at the close of plaintiff's case, viz:

FIRST.—Contributory negligence of the plaintiff.

SECOND.—That the evidence failed to establish negligence on the part of the defendant.

THIRD.—That the injury was caused solely by the negligence of a fellow-servant of the plaintiff.

The denial of this motion was not error.

The considerations already urged in answer to the exception to the denial of the first motion, apply with equal and even greater force to this exception. The testimony of the defendant's witnesses strengthened the plaintiff's case.

(*A.*)

ON CONTRIBUTORY NEGLIGENCE.

On the question of contributory negligence the defendant's witnesses corroborated the plaintiff's. They all agreed that it was a necessary duty for Carey to step out into the hatch in order to grasp a descending tub (fols. 107, 108, 144, 145, 146). The evidence that when struck he was not immediately under the hatch, but by the edge (fol. 40), was not contradicted.

(*B.*)

ON DEFENDANT'S NEGLIGENCE.

On the question of the defendant's negligence the witnesses of the defendant who were questioned in regard to it, admitted that the rope where it parted was chafed, fagged, jagged, worn, and the strands separated and all

fagged out (fols. 101, 102, 109, 141). Craven, the foreman stevedore (fol. 96), testified that it was O'Brien's duty to notify Gerraghty if the rope was chafed and worn out (fol. 107), and the men so considered it (fols. 179, 180). Gerraghty admitted that O'Brien called his attention to the rope (fols. 134, 135), and Joseph Redmund, who was present, testified he heard O'Brien tell Gerraghty "he thought the fall wasn't fit for the business, or something to that effect" (fol. 148).

The word splice was frequently used by the defendant's witnesses, which tended to produce the impression that this was a spliced rope, and that it untwisted and drew apart at the place where spliced. It is extremely doubtful whether this was a spliced rope. The man who [redacted] the fall saw no splice in it (fol. 177), nor did Gerraghty (fol. 134]. If it was a spliced rope the evidence of the defendant's own witnesses shows that it was negligent to use a spliced rope for that fall (fols. 115, 96, 97, 102, 125, 129). The testimony of Philip W. Lowe, an expert (fol. 113), shows that splicing don't improve a rope, and that it is unsafe to use a spliced rope which has to pass through sheaves or blocks (fol. 115), for the manifest reason that the friction will wear down and chafe the spliced part and cause chafing, untwisting and drawing of the splice (fol. 125). This fall passed through three blocks (fols. 96, 97). The testimony of David Smith, the witness, who says he spliced the rope, shows that it was chafed and worn at the time he spliced it (fols. 119, 120, 129), and it was used only twice after it was spliced before it parted (fol. 119). The testimony of the defendant's witnesses also show that it is customary to use a rope for a coal fall only(!) five or six months (fol. 101). The rope was received and cut up in falls for use in hoisting coal on the 13th of April, 1880 (fols. 118, 119). The accident happened on the 3d of November, 1880 (fol. 39), nearly seven months, showing that the rope should have been discarded at the time it was spliced a week before the accident. Even if it would be proper to splice a sound rope the testimony of the defendant's own witnesses shows that this rope was chafed, fagged, jagged, worn, and the strands separated and all

fagged out at the place where it parted, and where it is said it was spliced (fols. 101, 102, 109, 141).

It is clear, therefore, on the defendant's own showing, that this rope was an unsound one, and unfit and unsafe to be used on that night. On its own showing the defendant failed to perform its duty; failed to furnish and maintain adequate and secure apparatus for the use of its workmen on the occasion in question, and failed to exercise proper care in view of the exigencies of the situation.

(*C.*)

No Negligence of Fellow-servants.

On the question as to whether the plaintiff's injuries were "caused solely by the negligence of a fellow-servant of the plaintiff," the evidence shows conclusively that it was not.

1.

On the trial and the motion for a new trial it was contended by counsel for defendant that the accident occurred because the turns in the rope untwisted at the place where it was spliced, which allowed the splice itself to draw; that it was the duty of O'Brien or Gerraghty, or both, to watch the rope and see that it did not untwist; or, if it did, to stop the work and put the turns in again; that O'Brien and Gerraghty were fellow servants of the plaintiff; that their failure to keep the turns in was the negligence of fellow servants of the plaintiff, whose injuries were caused thereby, for which the defendant could not be held liable.

It requires some credulity to believe that no ropes are manufactured which can be used on a coal fall without requiring a stoppage of the work every few minutes for the purpose of putting turns in. The ordinary mind cannot resist the conviction that a rope liable to act as the defendant contends this one was, is not a rope which has any place on a coal fall where the lives and limbs of hundreds and even thousands of men are at stake. But conceding for the moment that the rope in question was liable to un-

twist, there is no evidence that it did untwist after Gerraghty put in the turns and steeped it in water, and, according to the testimony of Craven, steeping the rope should have prevented the turns coming out (fol. 103). And further, the evidence of Gerraghty himself shows that, although he disclaims being an expert in ropes (fol. 141), and although he made a very slight examination of the rope when he steeped it, he discovered that it was jagged (fol. 141). Hence there was inherent defect in the rope itself, aside from its assumed liability to untwist, so that even if there was negligence on the part of O'Brien or Gerraghty in not putting the turns in, there would still remain negligence on the part of some agent of the defendant in not having supplied or maintained a good rope. The accident could not, then, be said to have been caused *solely* by the negligence of O'Brien or Gerraghty regarding them both for present purposes as fellow-servants.

Therefore, we can, on the defendant's own evidence (as heretofore in considering the corresponding point of the plaintiff's case), invoke the rule, that where the master furnishes defective or inadequate machinery for use in the prosecution of his business, he is not excused by the negligence of a servant in using the machinery from liability to a co-servant which could not have happened had the machinery been suitable for the use to which it was applied.

Grand Trunk R. R. *v.* Cumming, 106 U. S., 700.

Cone *vs.* R. R., 81 N. Y., 206.

Ellis *vs.* R. R., 95 *id.*, 546.

Striugham *v.* Stewart, 3 East. Rep., 73.

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PATRICK CRAVEN.

That Patrick Craven occupied a representative position to the defendant is clearly established by the defendant's own witnesses. He was the foreman stevedore; he had power to hire and discharge men, and it was his duty to see that the apparatus was proper, safe and adequate (fol. 96); he superintended the rigging of that fall, and he

testifies that he saw the fall rigged (fol. 96); while he also testifies that it was in good condition (fol. 96), yet his testimony shows that he could not have examined the rope before the fall was rigged; it is questionable whether he intended, without mental reservation, to testify that he saw the splice in the rope; at all events he did not see the splicing at or before the time the fall was rigged, and did not notice it until some time after, when he was looking over the ship's side (fol. 97); the only examination he made of the rope was on the morning after the accident (fol. 101) when he admits he found it chafed; after his examination the rope disappeared (fol. 108); he was sick on the night of the accident (fol. 104), which accounts for his inattention and carelessness; he could not tell who rigged the fall (fol. 105); he was not on the scow where he could have been close enough to observe the condition of the portion of the rope which parted; before he went home at nine o'clock (fol. 99, 104) the alarming condition of the rope was know to others, and could have been ascertained by him had he performed his duty; Redmond, O'Brien and Gerraghty knew it about eight o'clock, the first time the latter's attention was called to it (fol. 148); if Redmond, and O'Brien, and Gerraghty knew of the condition of the rope at that time, was it not also Craven's duty to know it? His ignorance of it, if he was ignorant, would in itself be negligence.

The negligence of Craven was the negligence of the defendant; he was the personal representative of the defendant to which his negligence is imputable. As corporations can only act through superintending officers, the negligence of those officers, with respect to other servants are the negligences of the corporation.

Wharton on Negligence, sec. 232a.

In no sense could Craven be held a fellow-servant of the plaintiff.

In the case of Chicago, &c., R. R. *v.* Ross, 112 U. S,. 383, this Court says:

"There is, in our judgment, a clear distinction to be

" made in their relation to their common principal between
" servants of a corporation, exercising no supervision over
" others engaged with them in the same employment, and
" agents of the corporation clothed with the control and
" management of a distinct department, in which their
" duty is entirely that of direction and superintendence."

Craven having the entire control and management of the work and apparatus of that dock and ship, occupied a very different position from the man at the winch, the shovelers in the hold, and other subordinates employed. He was, in fact, and should be treated as the personal representative of the corporation. The defendant being a corporation, could not act personally. It required some person to superintend structures, to employ and discharge men, and to provide all needful appliances. That could only be done by an agent such as Craven, and though in the performance of the executive duties mentioned, he was a servant of the corporation, he was not in those respects a co-servant, a co-laborer, or a co-employee, in the common acceptation of those terms, any more than a director of the defendant.

" Those agents of corporations having the superintend-
" ence of various departments, with delegated authority
" to employ and discharge laborers and employees, pro-
" vide materials and machinery for the service of the
" corporation, and generally direct and control under gen-
" eral powers and instruction, are regarded in law as the
" representative of the corporation, charged with the per-
" formance of its duties, exercising the discretion ordi-
" narily exercised by principals, and, within the limits of
" the delegated authority, the acting principal. These acts
" are in such a case the acts of the corporation, for which
" and for whose neglect the corporation, within adjudged
" cases, must respond, as well to the other servants of the
" company as to strangers. They are treated as the gen-
" eral agents of the corporation in the several depart-
" ments committed to their care."

Chicago, &c., R. R. *v.* Ross, *ubi sup.*

It is clear, therefore, under the rule above stated, as held

by this Court, that Craven was not a fellow-servant with the plaintiff, but the agent and representative of the defendant. It is the contention of the plaintiff below that Craven was guilty of negligence as before shown on the night in question prior to his departure at nine o'clock; that if he had exercised proper care, either before the fall was rigged at five o'clock (fol. 96), or after that and before his departure at nine o'clock (fols. 99, 104), he could have ascertained the dangerous condition of the rope, have properly repaired or replaced it with a new and better one, and so prevented the calamity.

3.

CHRISTOPHER GERRAGHTY.

In Craven's absence, his duties devolved upon Gerraghty (fols. 105, 112, 139). Gerraghty then had the power of hiring and discharging men (fol. 112) and of full superintendence on the dock and ship pertaining to loading and unloading (fols. 105, 112). He, therefore, stood in Cravven's shoes as Craven stood in the shoes of the company. Gerraghty knew that Craven went home at nine o'clock (fol. 145). He testifies that it was half-past nine when he steeped the rope (fols. 134, 135, 138), that he considered it his duty at that time to look after the apparatus, and that he was called on the scow for that purpose (fols. 135, 139), and that there was nobody there that he knew of, whose duty it was to look after the fall at that time but himself (fol. 139). Craven testifies that Gerraghty was left in full charge (fol. 105). He did also testify that Graham, another man, sometimes looked after the falls (fol. 112), but Graham had left at six o'clock (fol. 167). Owing to the sickness of Craven, Gerraghty was exercising control even before Craven left, and Craven was on the dock for only about half an hour that night before he went home at nine o'clock. He himself testified, "I was around the "dock for about half an hour; I was sick and went up "and laid down in my room, and could not lie there, and "came down and walked around the dock." "Five min-"utes after nine when I went out of the gate" (fol. 99).

This accounts for the fact that Gerraghty was on the scow looking after this fall about eight o'clock (fol. 148) before Craven left, as well as at half-past nine (fol. 134), after Craven had gone. Craven, then, being either disabled or absent, and Graham being absent, there cannot be the slightest possible doubt that Gerraghty was the man in full charge of both men and gear (fol. 112). If he was not, then no one was, and the vast business of that dock was allowed to run itself, with no one to superintend and direct. If this was the case, then that fact itself establishes negligence on the part of the company.

The same degree of care which a corporation should take in providing its machinery must be observed in selecting and retaining its employees. Ordinary care on its part requires that degree of diligence which ought reasonably to be observed in view of the exigencies of the particular service and commensurate with the perils or dangers likely to be encountered.

Wabash P. R. *vs.* McDaniels, 107 U. S., 454.

One of the perils likely to be encountered was the parting of that rope, and some one should have been appointed and retained to watch the rope who was competent for that purpose. The absence of such a person would be a failure on the part of the company to provide competent workmen, that is, conceding it to be the duty of an ordinary workman to look after the tackle. If Graham had entire control of the machinery--if it was his duty to watch this rope—then he was the representative of the company, having charge of that department of its business, and his negligence in not attending to the rope—in leaving the dock at six o'clock (fol. 167), when work was to be continued after that hour—was the negligence of the company. But if he was subject to Craven's orders, then Craven was negligent in allowing him to depart at six o'clock without substituting some one in his place.

So that in whatever aspect we view the question the negligence is readily traceable to the company itself, and, under the rules held by this Court, there was no negligence on the part of any fellow-servant of Carey.

There was no error, therefore, in the denial of the mo-

tion on all the evidence to direct a verdict for the defendant below.

Third.

On Exceptions to the Admission of Evidence.

I.

The first exception of this character at folio 41 was to the reception of Carey's testimony as to what the surgeons advised him respecting the amputation of his leg. This exception was untenable. The evidence was not objected to as incompetent, but only as immaterial, and was properly admitted. What the surgeons said was material to show Carey's critical condition and the serious and dangerous character of his injuries, hence had bearing upon the question of damages. Their subsequent corroborative testimony (fols. 50, 60) was admitted without objection. The plaintiff in error therefore could not have been prejudiced.

Railway Company *vs.* Ross, 112 U. S., 383.
Brobst *vs.* Brock, 10 Wall., 519.
R. R. *vs.* Jurey, 111 U. S,, 585.
Bank *vs.* Bank, 21 Wall., 294.

II.

The exception at folio 74 was to the admission of a conversation between John O'Brien and Gerraghty, the foreman, in reference to the condition of the rope at the time. This exception was not well taken. The evidence, even at that early stage of the trial, disclosed the fact that Gerraghty was the acting foreman in charge of the work in which O'Brien and Carey were engaged (fols. 73, 42). The testimony as to what O'Brien said to Gerraghty was competent to show, first, the condition of the rope at the time; and second, notice to the foreman in charge, whose duty would at least presumably be to repair the rope or notify the proper person to do so. Notice to the defendant, a cor-

poration, could be proved by showing notice given either to its officer or agent, who was at the time acting for the corporation in the matter in question, and within the range of his authority or supervision; or to one whose duty it was to receive and communicate such information to his principal.

Abbott's Trial Evidence, page 45, sec. 53.
Hough *vs.* R. R., 100 U. S., 213.
Pantzar *vs.* Mining Co., 99 N. Y., 368.
Corcoran *vs.* Holbrook, 59 *id.*, 517.

It sufficiently appeared at that stage of the trial that attention to the condition of the rope and all the tackle in use at that time in that work was within the range of the authority and supervision of Gerraghty. When O'Brien discovered that the rope was chafed over a surface of from five to six feet; that there were several yarns worn off; that the rope, at that place was considerably fagged out; all of which was so apparent as to arrest his attention without formal inspection (fol. 73)—who should he have notified if not Gerraghty, his foreman?

III. & IV.

The exceptions at folio 77 were not well taken. The question objected to called for the opinion of the witness. It had appeared that he was a rigger and competent to testify as an expert (fols. 70 and 71). The question was, "Could that rope have worn down to that condition on a "fall passing through those pulleys from the time they "commenced to hoist to the time it attracted your atten-"tion." The object of this question was to show, or tend to show, that the rope was in an unfit and unsafe condition when the hoisting commenced that night, and that its condition could then have been seen by proper or even slight inspection. There can be no doubt as to the competency of such evidence. It is permitted to ask questions of an expert which cannot be put to ordinary witnesses. It is no objection that the question involves a point to be decided by the jury. An expert witness can properly aid the jury by such evidence. It is upon sub-

jects on which the jury are not as well able to judge for themselves as the witness that an expert, as such, is expected to testify. The jury could not be expected to judge as well as this expert whether that rope could have worn to the condition he described during the one or two hours which had elapsed since the rigging of the fall. The books give a great variety of cases in which evidence of this character is held competent and admissible. The rule is fully discussed and authorities reviewed in

Transportation Line *v.* Hope, 95 U. S., 298.

In the case of

Walsh *v.* Washington Ins. Co., 32 N. Y., 427,

evidence of expert navigators was held admissible as to the effect produced upon a ship by rolling in and encountering the perils of a heavy sea. In the same case the evidence of shipwrights was held admissible to show that plugs a foot in length, such as witnesses described, inserted in twenty-inch holes, could not by possibility arrest rush of water between the ceiling and the timbers, or retard the sinking of the ship; and also to show that a plug inserted in an apperture described, would necessarily swell from the effect of the water. This case of Walsh *vs.* Washington Insurance Company, decided by the Court of Appeals of the State of New York, was cited with approval and quoted from by this Court in the case of

Transportation Line *vs.* Hope, *ubi sup.*

Fourth.

On Exceptions to Charge and Refusals to Charge.

I.

The exceptions at fols. 183, 184, 185, 202, may be considered together. They are as follows :

REFUSALS.

"FIRST.—That in the management and operation of the "hoisting apparatus Gerraghty, and O'Brien were fellow-"servants of the plaintiff" (fol. 183).

"SECOND.—That if there was negligence on the part of "O'Brien, and also of Gerraghty, in the operation of the "hoisting apparatus and the use of the fall which parted, "and the plaintiff's injury resulted from such negligence, "or that of either of them, they being his fellow-servants, "he cannot recover against the defendant, whether the "plaintiff was guilty of contributory negligence or not" (fol. 184).

"FOURTH.—That Christy Gerraghty was, in the opera-"tion of the apparatus, a fellow-servant of the plaintiff, "and if the injury was occasioned solely by his careless-"ness in operating the apparatus, the plaintiff cannot re-"cover" (fol. 185).

PORTION OF MAIN CHARGE EXCEPTED TO.

"Craven was an agent of the defendant, intrusted with "the duty of selecting the machinery, and of exercising, "after it is selected, controlling and governing, super-"vision, and rejection, when selected machinery becomes "unsafe, and knew, or ought, in the exercise of ordinary "care, to know of its unsafety" (fol. 202).

All of these exceptions raise the same question, viz.:

"What constitutes a fellow-servant?"

The exceptions to the fourth refusal (fol. 185) and to the portion of the main charge (fol. 202), are clearly untenable.

That Craven and Gerraghty were not fellow-servants of the plaintiff is entirely beyond question in this case. They both exercised supervision and control over men and gear; Craven absolutely at the time the fall was rigged, and nominally thereafter until he left for home at nine o'clock.

The evidence shows that in Craven's disability and sickness Gerraghty was in actual control before Craven left. After Craven's departure Gerraghty's control was absolute and supreme. Hence neither, at any time during the long series of negligences on the night in question, were fellow-servants within the rule of this Court.

Hough *vs.* R. R., *ubi sup.*
Railway *vs.* Ross, *ubi sup.*

In the Ross case this Court held that a conductor was not a fellow-servant of the other employees on a railway train.

The Court in that case says:

"The conductor of a railway train, who commands its "movements, directs when it shall start, at what stations "it shall stop, at what speed it shall run, and has the "general *management* of it and control over the persons "employed upon it, represents the company, and for in- "juries resulting from his negligent acts the company is "responsible. If such a conductor does not represent the "company, then the train is *operated* without any repre- "sentative of its owner."

The analogy between the conductor and Craven and Gerraghty is complete. They had command of the movements of the hoisting apparatus and the general management of it and control over the men who were working it, and hence they were not fellow-servants of the plaintiff, but agents and representatives of the company.

The exceptions to the first and second refusals (fols. 183, 184) were untenable on another ground, viz.: each containing two separate propositions: first, that Gerraghty was a fellow-servant, and second, that O'Brien was a fellow-servant. In no aspect of this case could both Gerraghty and O'Brien be regarded as fellow-servants. If Gerraghty was not, then even if O'Brien was, the requests were properly refused. A prayer for instructions, consisting of a number of propositions presented as a whole, may be refused if any of them should not be given.

Worthington *vs.* Mason, 101 U. S., 149.

Beever *vs.* Taylor, 93 *Id.*, 46.
United States *vs.* Hough, 103 *Id.*, 71.
Harvey *vs.* Tyler, 2 Wall., 328.
Lincoln *vs.* Claflin, 7 *Id.*, 132.

II.

The exceptions at fol. 185 to the third and fifth refusals may be considered together *seriatim.*

They are as follows:

THIRD.—" That O'Brien was a fellow-servant of the " plaintiff, and if the injury was occasioned solely by his " negligence the plaintiff cannot recover."

This request was refused on the ground that it was included in and covered by the main charge (see fol. 191), where the trial judge instructed the jury as favorably to the defendant as it could reasonably desire. No authority can be found in this Court to sustain the proposition that the refusal to charge specifically as matter of law that O'Brien was a fellow-servant of the plaintiff, was error. On the contrary, this Court has held it unnecessary to lay down a rule which will determine what in all cases is to be deemed a fellow-servant, even if it were possible to do so.

Railway *vs.* Ross *ubi sup.*

There was nothing in the evidence in the case at bar calling for this charge as requested There was nothing to show that there was any negligence on O'Brien's part. He of all others was the last man who could be charged with any negligence whatever.

" FIFTH.—That if the fall was sufficient in itself and " adequate for the work when delivered to the workmen, " and the injury occured though their negligent use of it, " the plaintiff cannot recover " (fol. 185).

This request was properly refused. There was no evidence in the case upon which to base such a request. The injury did not arise in consequence of any negligence *in the use* of the rope. There was no evidence that the en-

gine and drum were carelessly operated, or that the rope itself was improperly run. The trouble was that the rope was out of order—worn down, chafed, jagged, and fagged out at the place where it carried away.

III.

The exceptions to the sixth refusal (fol. 186) and to the portion of the main charge (fol. 201), present the same question viz.: the degree of care required of a master in providing appliances.

SIXTH.—"That the duty of the company to its employees "is discharged when its agents, whose business it is to "supply the apparatus, exercise due care in the pur- "chase thereof, and keeping it in a reasonably safe condi- "tion for use" (fol. 186).

This request was refused on the ground that it was included in and covered by the main charge (fols. 191, 192), where the Judge instructed the jury with the elaboration and impartiality.

The exception to the main charge at fol. 201 had reference to the word "adequately."

"That the employer is obliged to exercise the care "which prudence requires in providing the servant with "machinery reasonably and adequately safe, for use by "the latter, the exception having reference solely to the "word 'adequately' in said portion of said charge" (fol. 201). This exception was not well taken.

Hough *vs.* R. R., *ubi sup.*,

where this very word is used in this connection.

IV.

The exceptions to refusals (fols. 187 and 201) and to portions of the main charge (fols. 201, 202) involve the question of the right of the trial judge to review and comment on facts and instruct concerning the same.

REFUSAL.

EIGHTH.—"That if the plaintiff had been warned by

"Craven not to be under the hatch when a draught was "coming up, and if the plaintiff was under the hatch "when the tub in question fell on him, he cannot recover" (fol. 187).

EXCEPTION TO PORTION OF MAIN CHARGE.

"I do not understand that the defendant's superintend- "ent, Mr. Craven, warned the workmen not to stand in "the hatchway, because there was danger of falling tubs, "but because there was danger of falling lumps of coal, "which might be jostled from the tubs in their ascent" (fol. 201).

REFUSAL TO CHARGE.

"That it was immaterial what the danger was if the "direction was that they were not to stand under the "hatch" (fol. 201).

EXCEPTIONS TO PORTIONS OF CHARGE.

"But if he was in a safe place from any such injury, "unless that injury should be effected by the unforeseen, "and not naturally to be anticipated negligence of ed- "fendant, then he is called upon to exercise only ordin- "ary care" (fol. 201).

"That is the only testimony upon the subject, and, "therefore, gentlemen, there is no need of your balanc- "ing testimony, but simply find out from what these two "persons (Craven and Gerraghty) say, what the author- "ity of Gerraghty was" (fol. 202).

All of these exceptions were untenable. The refusal at fol. 187 was proper, as it involved the question of contributory negligence, which was a question of fact for the jury.

Hough *vs.* R. R., *ubi sup.*
R. R. *vs.* Jones, *ubi sup.*

The comments of the Judge, and his refusal to make certain comments, were entirely proper and within his discretion. In his charge he had in separate paragraphs

stated the law and the facts, emphasizing the distinction between the two. It is within the province of a Court in the exercise of its descretion to sum up the facts in the case to the jury, and submit them with the inferences of law deducible therefrom, to the free judgment of the jury, exercising care to separate the law from the facts.

Insurance Co. *vs.* Trefz, 104 U. S., 197.
Tracy *vs.* Swartwout, 10 Pet., 80.
James *vs.* Dunn, 14 Pet., 322.

This the Judge did, as is clearly seen by the various exceptions and in the charge throughout (fols. 189, 190, 192, 198).

The comments in regard to Craven's warning (fols. 201, 189), were strictly within this rule, and the refusal to make the comment was proper and in accordance with both the law and the facts. The character of the danger which Carey was to guard against was material. There was a vast distinction between the danger of falling tubs and falling lumps of coal. The falling of lumps of coal which might be jostled from the tubs in their ascent was a danger naturally to be expected from the nature of the business, which could not be guarded against by diligence on the part of the master, and therefore a risk of plaintiff's employment; *but the danger of falling tubs in consequence of the parting of defective ropes supplied by the master, was a hazard not naturally to be expected, and which could be guarded against by proper diligence on the part of the master.*

Hough *vs.* R. R., *ubi sup.*

V.

The remaining exceptions at fols. 187, 202, 203, relate to portions of the charge and refusals to charge concerning the condition of the rope.

THE REFUSAL TO CHARGE

"that the jury cannot draw the conclusion that from "the appearance of the rope when O'Brien noticed it, it

" was insecure at the time when it was furnished, and " that the plaintiff's claim in that respect is unfounded" (fol. 202) was proper. The instruction prayed for overlooked facts of which there was evidence (fol. 77).

Transportation Line *vs.* Hope, *ubi sup.*

The instruction was therefore properly refused.

Lucas *vs.* Brooks, 18 Wall., 436.
Orleans *vs.* Platt, 99 U. S., 676.

The Court should not instruct the jury that certain evidence in the cause does not warrant them in finding negligence. The question should be left to the jury upon the whole evidence.

Smith *v.* Condy, 1 How., 28, 17 Pet., 20.

THE REFUSAL TO CHARGE.

" That if, when Gerraghty had put the turns in the " rope and wet it, it was then in an apparently " good condition and fit for use, provided it was kept " from becoming untwisted, and if Gerraghty direct- " ed O'Brien to keep watch of the rope, and if the turns " came out again to stop and put them in again; and if " thereafter the splice of the rope drew out in conse- " quence of the turns coming out again, O'Brien having " failed to see that they were so coming out, and by rea- " son of such drawing of the splice the plaintiff received " his injury, such injury was the result of negligence of a " fellow servant, and the plaintiff cannot recover" (fol. 187).

This request was properly refused. All these matters were questions of fact for the jury and not questions of law for the Court. Instructions to the jury should not be given in such form as to supersede an inquiry by them into the facts of the case.

Canal Co. *vs.* Knapp, 9 Pet., 541.

The instruction asked for would have superseded the inquiry by the jury as to whether there was not negligence on the part of the defendant *even* " if when Ger-

" raghty had put the turns in the rope and wet it, it was " then in an 'apparently' good condition and fit for use." Even the expert witnesses of the plaintiff testified that the effect of wetting the rope would be to tauten it up and make is a little stronger for the time being, but that the after effects would be to make it fag quicker if it was an old rope (fols. 75, 77, 85, 86, 95). Even admitting that the rope after being wet was in an "*apparently good condition*," the question still remains whether the defendant had not failed in its duty in not having that good condition *real* as well as *apparent*. This was an old rope (fol. 77), and had been in use seven months (fols. 119, 39), one month longer than it was customary to use a rope for a coal fall (fol. 101). So that there was a question for the jury as to whether the defendant in the exercise of proper care should not have supplied a new rope in a *real good condition*, instead of patching up and tinkering with this old rope to give it a *deceptively apparent good condition*.

Exceptions to Portions of Main Charge.

The exceptions at fols. 202 and 203 to the portion of the charge set forth below were not well taken.

" If you think that the rope was in a good condition " when it went upon the fall, and thereafter became in a " bad condition, which Gerraghty then, being in the shoes " of Craven, and in the absence of Craven, knew, and " which he ought to have attended to himself, and which " he did not attend to, and the accident happened in con- " sequence of his negligence, then the plaintiff has made " out his case" (fols. 202, 203).

" If, on the other hand, you think that Gerraghty did " all that it was his duty to do, and that this was a simple " matter which required no care, and which it was a safe " thing to entrust to the hands of O'Brien, if he did " entrust it to his hands, then another conclusion will " naturally follow, that is, that he was not guilty of negli- " gence" (fol. 203).

These exceptions were not well taken. It is difficult to

understand why this portion of the charge should have been excepted to. It embraced the seventh request to charge of the defendant below (fols. 186, 187).

Hough *vs.* R.R., *ubi sup.*
Wabash R. R. *vs.* McDaniels, *ubi sup.*
Railway Co. *vs.* Ross, *ubi sup.*

This portion of the charge was as fair and impartial as could be desired by either side.

Fifth.

GENERALLY.

Seldom was a case tried with more impartiality or more favorably for a defendant, which was given the benefit of every reasonable doubt. The main charge of the judge covered the entire case and properly submitted it to the jury. Further instructions were, therefore, properly refused.

R. R. Co. *vs.* Horst, 93 U. S., 291.

The judge was not bound to give instructions in the terms required by the defendant below. It was sufficient if so much thereof was given as was applicable to the evidence before the jury, and the merits of the case as presented by the parties.

Clymer *vs.* Dorkids, 3 How., 674.
Kelly *vs.* Gage, 6 Pet., 622.
Railway Co. *vs.* McCarthy, 96 U. S., 258.

Even if in twenty-three exceptions there should be discovered a few technical errors, it plainly appears on the face of the record that the judgment below was right, and this Court has repeatedly refused to reverse judgments on errors

committed on trials which worked no injury to plaintiffs in error, and which could not have affected the verdicts.

Railway Co. *vs.* Ross, *ubi sup.*
Probst *vs.* Brock, 10 Wall., 519.
R. R. *vs.* Jury, 111 U. S., 585.
Bank *vs.* Bank, 21 Wall., 294.

Sixth.

The judgment below should be affirmed, with interest, costs and damages for delay, under general rules twenty-three and twenty-four.

Respectfully submitted.

WILLIAM C. TRULL,
HERMON H. SHOOK,
Of Counsel for Defendant in Error.

[H 6972]

119-245

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Supreme Court of the United States.

THE CUNARD STEAMSHIP COMPANY (Limited),
Plaintiff in Error.

vs.

PATRICK CAREY.

Supplemental Brief of Defendant in Error.

FIRST POINT.

On Contributory Negligence.

A.

The plaintiff in error contends that the plaintiff below was guilty of contributory negligence in being under the open hatch, which was a place of manifest danger. The *manifest dangers* enumerated by counsel are as follows: "The men were working at night; the "hatch was pretty well filled up by tubs, as they were "in constant motion, one ascending and the other de- "scending, and naturally would jostle against each "other; they might strike the bulkhead; their contents "might fall out; or they might strike against each other;

'there was risk of the men above not guiding them "properly; of the men at the winch not lowering or "hoisting them properly." (Brief of plaintiff in error, pages 12 and 13).

(1.)

We concede that all these dangers existed, and it is unnecessary to contend that they were not risks of the plaintiff's employment.

But our answer is that the accident which resulted in Carey's injuries did not arise out of any of these enumerated dangers; but was caused by the parting of a defective rope, which was a danger *not manifest* to the plaintiff, and a danger which could have been guarded against by proper diligence on the part of the defendant below.

The charge of the Trial Judge (fol. 190), in this respect was fair and correct:

"If the plaintiff is sent to work in a place where "serious calamities might naturally be expected to arise, "and where dangerous accidents might be naturally ex- "pected to happen, then he is called upon either not to "go there or to exercise extra precaution, or else to bear "unrewarded the consequences. But if he was in a safe "place from any such injury, unless that injury should "be effected by the unforeseen and not naturally to be "anticipated negligence of the defendant, then he is "called upon to exercise only ordinary care."

This charge is sustained by the doctrine laid down in

Hough vs. R. R., 100 U. S., 213.
R. R. vs. Jones, 95 U. S., 439.

In the latter case it is said by this Court:

"One who by his negligence has brought an injury "upon himself cannot recover damages for it. * * * "*But where the defendant has been guilty of negligence "also, in the same connection, the result depends upon "the facts.*"

We do not concede that the plaintiff below was guilty of any negligence. But if his acts constituted negligence, they in no way contributed to his injuries.

Our contention is that even if the plaintiff, although negligent, would have suffered no injury had proper care been observed by the defendant, this action is maintainable.

Baltimore, &c., R. R. vs. Kean, Eastern Reporter, Vol. 6, No. 5, page 437.

(2.)

It has never been held by any Court that being in a dangerous place is negligence *per se*. In every case where a servant is injured he is of course in a place where the danger of the calamity exists, but to hold that he is therefore guilty of contributory negligence would defeat a recovery in every conceivable case.

The cases cited by the plaintiff in error go upon the ground that the servant *unnecessarily* placed himself in a position of danger.

In the Jones case the plaintiff was injured while riding on the pilot of a locomotive, where his duty did not call him, there being room in a box-car attached.

In the Randall case a brakeman was injured while working at a switch in a place where it was unnecessary for him to stand.

But the rule is well settled that *where a plaintiff is*

necessarily in a place of danger exercising all the care and caution which a prudent man would exercise under the circumstances, he is not as matter of law guilty of contributory negligence.

Thompson on Negligence, 1018 to 1021
and cases there cited.

In an action against a railroad corporation for personal injuries sustained by the plaintiff through being run over by a locomotive engine of the defendant while he was at work on a side track of the railroad *where he was required to be and to concentrate his attention upon his work held* sufficient to warrant the jury in finding that the plaintiff was rightfully where he was and was not in fault in being engrossed in his work.

Goodfellow vs. R. R. 106, Mass, 461.
Quirk vs. Holt, 99 id., 164.
Hackett vs. Middlesex, Mfg. Co. id 101.
Mayo v. R. R. 104 id., 137.
Wheelock v. R. R. 105 id., 203.

It has been held not to be contributory negligence for a foreman of car repairs to go under a car in order to ascertain its condition which his duty required him to do.

Berry v. R. R. 40 Iowa, 564.

(3.)

That Carey was necessarily by and under the open hatch is shown by the fact that in hooking and unhooking tubs he had to send up a full tub and grasp a descending one, (fol. 39) to do which he would obviously at

times be compelled to advance under the hatch there being no other way to do the work.

This is conclusively established by the defendant's two principal witnesses, Patrick Craven and Christopher Gerraghty, (fols. 107, 108, 144, 145, 146.) It is true these witnesses did endeavor to testify the other way, but a reference to the foregoing folios will show that on cross-examination they were forced to reluctantly admit that reaching or stepping over was a necessary act in the performance of Carey's duties.

The defendant's counsel on re-direct endeavored to rescue these witnesses from their dilemma resulting in still stronger evidence for the plaintiff, (fols. 110 and 145 and 146.)

A short extract from Gerraghty's re-direct examination will suffice as an example, (fols. 145 and 146.)

Q. "Was it the duty of either man down in the "hold at the hatch, on either side of the hatch, to step "out under the hatch while a loaded tub was going up "for any purpose?

A. "A man is never supposed to put himself in "danger *if he can avoid it.*

Q. "Was it necessary for him to do so?

A. "*Well it was necessary for him to do so to catch "the empty tub.*

Q. "Could he not have waited until the loaded tub "was on the upper deck?

A. "*The other tub would be landed and then he "couldn't get it where he wanted it.*"

B.

The plaintiff in error contends that the plaintiff below "was injured while he was acting in violation of

express instruction not to be standing underneath the hatch with a draft going up," and cites 2 Thompson on Negligence, 1018, as authority for the rule that when a servant disobeys a reasonable regulation established for his safety, he cannot recover.

(1.)

But Mr. Thompson in the same section says:

"But an intentional violation by the servant of the "rules established by the master, will not prevent the "servant from recovering damages of the master, un- "less such act of the servant was a *proximate cause* of "the injury. Such an act on the part of the servant, "although a breach of his contract, does not absolve "the master from his obligation to use due care to "promote the safety of the servant. Accordingly, "where certain miners started to return from the pit "before the usual hour for stopping work, for the pur- "pose of making representations to the owner about "certain supposed grievances, and, while so doing, one "of them was killed by the falling of a stone from the "top, which was caused by the planking being in an "unsafe state, it was held that an action might be sus- "tained."

Marshall (or Brydon) v. Stewart, 2 Macq. H. L. cases, 30.
s. c. 33, Eng. Law & Eq., 1.
1 Pat. Sc., App. 447.

The rule that to defeat a recovery the plaintiff's negligence must contribute approximately to the injury is approved by this Court in

Northern Pacific R. R. Co. v. Herbert, 116 U. S., 656.

and is also applied in

Lock vs. S C. & P. R. Co., 46 Iowa, 109.
Gates vs. B. C. R. & M. R. Co., 39 *id.*, 45.

Whether the violation of instructions to a servant is contributory negligence, is a question of fact for the jury, to be determined upon all the circumstances of the case.

Locke vs. S. C. & P. R. Co., 46 Iowa, 109.

(2.)

But we contend that, as a matter of fact, there was no violation by Carey of any instructions whatever. The instruction claimed to have been given was in the language of Craven, "not to be *standing* underneath the hatch with a draft going up." There is no evidence that Carey was *standing* underneath the hatch. All that is claimed is, that he "simply stepped up and grasped" a descending tub (p. 17 Brief of Plaintiff in error.)

Gerraghty testifies (fol. 143) that the direction to the men was "to keep clear of the hatch *as well as they could.*" It would be absurd to suppose, or for a moment believe, that the meaning of either Craven or Gerraghty was, that a workman stationed like Carey should not reach out or step over to grasp a descending tub. Any direction not to stand under the hatch must of necessity have excepted an advance under the hatch for the purpose of receiving the tubs in order to guide them to the place where they were to receive the coal. There is no evidence that Carey was forbidden to grasp or attempt to grasp a descending tub in the manner in which he did, and there was no other way for him to do it (fols. 39, 107, 108, 144, 145, 146, 110.)

C.

We will concede that if the plaintiff, "heedless of "apparent risks, disobedient of express direction, and "regardless of repeated warnings, interfered with the "duty of the man opposite him, and placed himself in "a position in which he received his injury," the Court below should have directed a verdict for the defendant.

(1.)

But the answer to all this is, that the plaintiff was guilty of none of these things. The danger of the parting of the defective rope was not apparent to him. The defendant's counsel conceded (fol. 76) that the defective part of the rope did not descend into the hold within Carey's sight. He was disobedient of no express directions. On the contrary he was doing exactly what he was told to do (fol. 45.) He was not interfering with the duty of any other man but simply performing his own. There was no man opposite to him performing duties similar to his on the other side of the hatch at, nor immediately previous to, the time of the injury, as the coal was all discharged from that side of the hold. (fol. 44, 64.) The coal remaining to be discharged being all on the inshore side of the hold (fol. 44 and 45) where Carey was stationed, there being no men working on the other side (fol. 44), and all the shovellers being at work on Carey's side (fol. 64), it follows that the tubs had to be filled on that side, to accomplish which they had to be guided by Carey to the shovellers on that side. How can it be said then that Carey was interfering with another man's duty?

(2.)

The man whose duty it is claimed was interfered with was Thomas Henretty, and although he was in the employ of the defendant at the time of the trial (fol. 104) he was not put upon the stand to make any complaint.

The counsel for plaintiff in error at page 19 of brief admit that "in the absence of that man [the man on "the other side of the hatch], a different line of con- "duct might possibly be imposed by the plaintiff."

D.

There was with Carey in the hold at the time five other men (fol. 39) all of whom with one exception were in the employ of the company at the time of the trial. But not one of them was put upon the stand to show any negligence on Carey's part. But is it our contention that Carey was not under the hatch when struck. (See original Brief of Appellee pages 4 to 7.)

Second Point.

On the Negligence of the Defendant.

A.

On the question of the negligence of the defendant below, the counsel for the plaintiff in error contend that no presumption arises from the happening of the injury (see brief of plaintiff in error, Second Point, page 21).

While this may be so in some cases, yet the rule is well settled that the very nature of an accident may of itself and through the presumptions it carries supply the requisite proof of negligence.

Wharton on Negligence, Sec. 441.
Shearman and Redfield on Negligence, Sec. 13.
Stokes vs. Saltonstall, 13 Peters, 181.
Transportation Co. vs. Downer, 11 Wall, 130.
Russel vs. Steamboat, 50 N. Y., 127.
Wyckoff vs. Ferry Co., 52 Id., 32, 36.
Platt vs. Hibbard, 7 Cow., 498, 500, 501.
Muller vs. St. John, 57 N. Y., 567.
Byrne vs. Boodle, 2 Hurl. & Colt., 722.
Scott vs. Dock Co., 3 Id., 596.
Fietal vs. R. R., 109 Mass., 398.
McMahon vs. Davidson, 12 Minn., 357.
Bridges vs. R. Co., Law Rep., 6 Q. B., 377.
Atchison R. R. Co. vs. Bales, 16 Kans., 252.
Kendall vs. Boston, 118 Mass., 234.
McKee vs. Bidwell, 74 Penn. St., 118.
Toledo R. R. vs. O'Conor, 77 Ill., 391.
Devlin vs. Gallagher, 6 Daly, 494.
Correll vs. R. R., 38 Iowa, 120.

That the accident in this case was of such a character is shown in the original brief of appellee, pages 8, 9, 13, 14, and 15.

B.

At the outset of the argument of counsel for plaintiff in error on the question of the negligence of defendant below the counsel fail to understand the language of the Trial Judge. Their contention at page 22 is that the Trial Judge held it to be the duty of the defendant to *use* the rope in the sense of *operating* it.

What the Judge did say was as follows.:

"The next and important point in the case is whether "the injury was caused by the negligence of the defen- "dant in providing an unsafe rope *or in using the rope "after it had become manifestly unsafe*, by its agents, "to whom the duty of selecting safe appliances *and "controlling the use* of and rejecting *unsafe ones* had "been intrusted." (Record, fol. 191).

C.

The claim of the plaintiff in error is that the accident was caused by "the drawing of the splice by reason of "the fall untwisting, or as it is otherwise expressed, the "turns coming out of the rope * * * an incident to "the operation of the fall to be prevented or corrected "by those operating the fall during its operation." (Pages 25, 26).

Assuming this to be the fact, they argue that the injury to the plaintiff below arose in the use of the rope, that the master's duty ended when it had supplied the rope in a good condition, and that if in using the rope the turns came out, it was not the master's duty to put them in again. *It is not their contention that the turns came out because of any* NEGLIGENT USE *use by the workmen, but that the coming out of the turns is an incident in the* CAREFUL USE *of the fall.* This contention involves the concession, that when the turns are out the rope is in a dangerous condition and unsafe to be used until the turns are put in again. Hence, when the turns are out, the rope is in need of repair. The putting in of the turns is making the repair. So that the contention of the plaintiff in error is, that it is not the master's duty to make repairs. But this Court has held otherwise in

D.

It is contended that it was the duty of O'Brien, the man stationed at the drum, to watch the rope and see that the turns did not come out, or if they did to put them in again.

Conceding, for the purposes of the argument, that such was the case, then we contend that he represented the master, as it was the master's duty to keep the rope in repair, a duty which could not be delegated to any servant of any rank or grade so as to exonerate the master.

Northern Pacific R. R. Co. vs. Herbert, 116 U. S., 642.
Shanny vs. Androscoggin Mills, 66 Me., 420.
Fuller vs. Jewett, 80 N. Y., 46.
Sheehan vs. R. R., 91 *id.*, 334.

In Northern Pacific R. R. Co. vs. Herbert, it is held that "An employer is not liable for injuries to his ser-" vant, caused by the negligence of a fellow-servant in " a common employment; but this exemption does not " extend to injuries caused by the carelessness or neglect " of another person in the master's service, in an " employment not common to that in which the person " injured is engaged, and upon a subject in regard to " which the person injured has a right to look for care " and diligence on the part of the other person as the " representative of the common master.

"If no one is appointed by a railway company to " look after the condition of its cars and see that the " machinery and appliances used to move and to stop " them, are kept in repair and good working order, it " is liable for the injuries caused thereby. If one is " appointed by it charged with that duty, and the in-

" juries result from his negligence in its performance,
' the Company is liable. He is, so far as that duty is
" concerned, the representative of the Company.

At page 647 Field J. in delivering opinion of Court, says: "It is well settled that it is the duty of the em-
" ployer to select and retain servants who are fitted and
" competent for the service and to furnish sufficient and
" safe materials, machinery or other means by which it
" is to be performed and to keep them in repair and
" order. This duty he cannot delegate to a servant so
" as to exempt himself from liability for injuries caused
" to another servant by its omissions. *Indeed no duty*
" *required of him for the safety and protection of his*
" *servants can be transferred so as to exonerate him from*
" *such liability.* The servant does not undertake to
" incur the risks arising from the want of sufficient and
" skillful co-laborers, or from defective machinery or
" other instruments with which he is to work. His
" contract implies that in regard to those matters his
" employer will make adequate provision that no danger
" shall ensue to him."

In Shanny v. Androscoggin Mills, 66 Maine, 420, quoted from with approval by Mr. Justice Field in delivering opinion of this Court in Northern Pacific R. R. Co., vs. Herbert 116 U. S.. at page 651 it is said " that
" the person whose duty it was to keep the machinery
" in order so far as that duty goes was not in any legal
" sense the fellow servant of the plaintiff. To provide
" machinery and keep it in repair and to use it for the
" purpose for which it was intended are very distinct
" matters. They are not employments in the same com-
" mon business tending to the same common result.
" The one can properly be said to begin only when the
" other ends. The two persons may, indeed, work

"under the same master and receive their pay from the "same source; but this is not sufficient. They must "be at the time engaged in a common purpose or em- "ployed in the same general business. We do not now "refer to the different grades of service about which "there is considerable conflict of opinion but of the "different employment. In the repair of the machinery "the servant represented the master in the performance "of his part of the contract, and therefore, his negli- "gence in that respect is the omission of the master or "employer in contemplation of law."

Andrews, J., in Fuller v. Jewett, 80 N. Y., 46, de- livering opinion of the Court says: "*Acts which the "master as such is bound to perform for the safety and "protection of his employees, cannot be delegated so as "to exonerate the former* from liability to a servant who "is injured by the omission to perform the act or duty, "or by its negligent performance, whether the non- "feasance or misfeasance, is that of a superior officer, "agent or servant, of a subordinate or inferior agent or "servant to whom the doing of the act or the per- "formance of the duty has been committed. In either "case in respect to such act or duty, the servant who "undertakes or omits to perform it is the representative "of the master, and not a mere co-servant with the one "who sustains the injury. The act or omission is the "act or omission of the master irrespective of the grade "of the servant whose negligence caused the injury, "or of the fact whether it was or was not practicable "for the master to act personally, or whether he did or "did not do all he personally could do by selecting "competent servants, or otherwise to secure the safety "of his employees."

Danforth, J., in Sheehan vs. R. R., 91 N. Y., 334,

delivering opinion of the Court of Appeals, says:

"Where the master delegates to another entire con-"trol over a particular branch or *circumstance* of his "business, the person to whom such power is delegated "stands in the place of the master as to all duties rest-"ing upon him to his servants, and his acts or omissions " relative thereto are the acts or omissions of the master "himself."

The counsel for plaintiff in error contend that O'Brien had absolute control of the circumstance of watching the rope and putting the turns in (see their brief, page 29).

So that the delegation to O'Brien of the duty of watching the rope to keep it in a safe condition would not relieve the master, because keeping the rope in a safe condition was the master's duty.

E.

The counsel for plaintiff in error contend that the defendant below was not bound to keep the rope in a safe condition at every moment of the work.

In their own language: "The duty of the master "with regard to furnishing and maintaining suitable "apparatus for employees, is no different from his duty "to provide reasonably safe places and structures for "his servants to work upon. But this obligation does "not impose upon him the duty of keeping the appar-"atus which the servants use, or the structure where "they are working, in a safe condition at every moment "of the work, so far as such safety depends upon the "due performance of that work by them and their fel-"lows."

The case of Armour vs. Hahn, 111 U. S, 313, de-

cided by this Court is cited as sustaining the above position. But no such doctrine is laid down in that case. The rule of that case was:

"The obligation of a master to provide reasonably "safe places and structures for his servants to work "upon, does not oblige him to keep a building *which "they are employed in erecting* in a safe condition at "every moment of their work, so far as its safety de- "pends on the due performance of that work by them "and their fellow-servants."

There is a vast distinction between the two propositions. The proposition of the counsel would relieve the master from the duty of maintaining his apparatus and structures in a safe condition for the purposes for which they were intended; but the proposition of the Court in the Armour case is that when structures *are being erected* the master is under no obligation to keep them safe at every moment *during the work of erection.* The plaintiff in the Armour case knowingly stepped upon a loose beam in a house which was in process of erection. As Mr. Justice Gray, in delivering the opinion of the Court, says:

"The projecting timber upon which the plaintiff "placed his foot was inserted in a wall which was in "the course of being built, and which at the time had "been bricked up only so far as to be on a level with "the upper surface of the timber. The usual course, "as the plaintiff himself testified, was to put the timber "in and leave it in that way temporarily, and afterwards "build the wall up over it. It is not pretended that "the stick of timber was in itself unsound or unsuitable "for its purpose. If it was at the time insecure it was "by reason of the risks ordinarily incident to the state "things in the unfinished condition of the building."

F.

It is not undisputed that this was a spliced rope. While the plaintiff below conceded that splicing a rope in a good condition would not weaken it, (Record fol. 98), he claimed, and we claim now, that this rope was not in a good condition *when* claimed to have been spliced, nor in the place *where* claim to have been spliced, (Record fols. 119, 120, 129, 101, 39), and see original Brief of Appellee, page 14; (see Record fol. 192). While the trial judge considered it "manifestly " the preponderance of evidence that it was a spliced rope," (Record fol. 192), yet a specific finding by the jury that it was not spliced, could be abundantly sustained by the evidence; (Record fols. 134, 177), and the judge at fol. 194, says: "I do not presume to de- " cide upon this question of fact." The claim of the plaintiff in error, in paragraph 3, page 25 of its brief, that the jury were bound to decide the case on the theory of a spliced rope is therefore unsound.

While it is immaterial whether the rope was or was not spliced, in view of the fact that the rope itself was inherently defective and dangerous, (fols. 47, 49, 62, 63, 68, 70, 78, 79, 80, 86, 74, 101, 102, 109, 141, 148), yet the evidence justifies the conclusion that the turns which untwisted, if they did untwist, were not the turns of a splice, but of an old and worn out rope.

The man (Short) who rove the fall saw no splice in it, (fol. 177), nor did Gerraghty, (fol. 134). Those who testify to a splice could hardly have known, as the rope was coiled up when they saw it, (fol. 177.)

It is evident that Gerraghty did not think the rope

was spliced. Gerraghty himself testifies that he did not see the splice in the rope, (fol. 134), that as far as he noticed all that was the matter with it, was that the turns were out, (fol. 135). It will be seen at a glance that if the turns of a splice come out, the splice will of course draw apart, and Craven so testifies, (fol. 102).

It is therefore almost inconceivable that Gerraghty would have ordered O'Brien to watch the turns and put them in if they came out, if he thought the turns were in a splice, for the reason that when the turns come out of a splice, the splice will instantly draw apart, before there is any time to put the turns in again. The turns Gerraghty had in his mind were the turns of an unspliced part of the rope. And a carefull examination of the testimony will disclose the distinction between the turns of a spliced and an unspliced part of a rope. If the turns of an unspliced part of a rope come out, it may not give way, if the rope is otherwise in a good condition; but if the turns of a splice come out, the rope will inevitably draw apart.

Third Point.

On the Negligence of Fellow Servants.

On the questions of the negligence of the fellow servants, counsel for the plaintiff in error contend in their third point that the injuries to the plaintiff below were caused by the negligence of either or both O'Brien and Garraghty.

JOHN S. O'BRIEN.

A.

The alleged negligence of O'Brien, consisted in his failure "to keep watch of the rope, and if the turns " came out to stop his drum and put them in again." To add emphasis it is said " in addition to this duty he " was *particularly directed* to watch the rope, and if " the turns came out, to stop and put them in again.' (See brief of plaintiff in error page 28.)

Admitting for the purposes of the argument that O'Brien was charged with this duty we answer :

There is no direct evidence in the case that the turns did come out after Gerraghty put them in and steeped the rope. No reference is made by counsel to any folio of the Record to show that they did ; all that can be claimed is that inferentially, "the injury happened by " the untwisting and drawing apart of the portion of " the rope spliced" which was the accommodating view taken of the evidence by the trial judge; (fol. 192), but he also added " I do not presume to decide upon this " question of fact which I have just submitted to your " consideration." (fol. 194).

These remarks of the judge constitute all the counsel rely upon to sustain their claim that " the accident was " caused by the turns coming out of the rope during its " operation, which is, therefore, directly attributable to " O'Brien. to whom was *entrusted the care of the* " *rope*" (!!) (brief of plaintiff in error page 29).

The counsel fail to see that these remarks of the trial judge do not sustain their position that the acci-

dent was caused by the negligent failure of O'Brien to put the turns in. The language of the judge is not that the accident happened in consequence of the turns coming out or the failure of O'Brien to put them in again, but "*untwisting and* DRAWING APART *of the por-* "*tion of the rope which was spliced;*" so that under this view the accident was caused by the concurring events of the *untwisting* AND *drawing apart* of the splice. It is no where claimed that it was O'Brien's duty to splice the rope. That was the duty of David S. Smith (fol. 117 of record) who has been ungraciously overlooked by the counsel in their search for negligent fellow-servants. How could O'Brien put the turns in after the splice drew ?

B.

But O'Brien, of all others who had anything to do with that rope on that fatal night, is the last man who can be charged with any negligence whatever. He, of all others, was the one man who vigilantly endeavored to avert the impending calamity. He testifies: "I spoke " to Mr. Gerraghty, and told him that the rope looked " bad, looked chafed, looked as if it wouldn't last much " longer to hoist with. He told me to go ahead with " it longer and continue to hoist, and I did so. Then " he came down again, about an hour or so afterwards, " and I spoke to him again about the rope; it was then " getting worse, and I told him that it looked worn, " and I was kind of afraid to hoist any longer, felt " timid-like; I was afraid there was going to something " happen—that the rope was going to carry away, " or something, and might hurt some one; I felt that " way; I told him that I felt afraid it might carry " away. (fol. 74.)

No wonder Gerraghty was afraid to look at the rope, (fol.133,) when he was afterwards down in the hold and heard that a man's leg was broken. What more could O'Brien have done than he did do?

C.

"Oh!" the counsel for plaintiff in error reiterate "he "should have obeyed the order of Gerraghty and "watched the rope to prevent the turns from coming "out and if they did come out to stop and put them "in again!"

The Court of Appeals of the State of New York, has had occasion to deal with precisely this line of argument in

Cone *v.* Del, Lack, & West, R. R. 81 N. Y. 206.

where a railroad employee was injured by the sudden starting of a locomotive, caused by its being defective and out of repair, of which defects the corporation had notice, and the Court of Appeals *held* that it was no defence that the engineer could have so managed the engine as to have prevented the accident.

Danforth, judge, delivering the opinion of the Court, at page 208 says:

"As between the plaintiff and the defendant, it was "the duty of the latter to furnish its employees for use "in the prosecution of its business good and suitable "machinery *and keep it in repair.* * * * * * The de- "fendant failed to supply machinery of that character. "The engine in question was, in many important par-

" ticulars, in bad condition; its fire-box was burned
" out, its stay bolts had given way; its cylinders needed
" boring out, its valves facing; it leaked badly; and its
" flues were defective; and coming nearer to the imme-
" diate cause of the injury inflicted upon the plaintiff,
" it was found that its throttle-valve leaked and the
" thread upon the screw which serves to hold the re-
" verse bar in place, and thus controls the motion of the
" engine, was so worn as to be useless. As a natural
" and necessary consequence of the defects last men-
" tioned, the steam escaped from the boiler into the
" cylinders, the engine was put in motion, and, as might
" have been expected, the accident occurred of which
" the plaintiff now complains.

" But more than this, the master mechanic and also
" the general superintendent of the road, the superior
" officers directly representing the defendant, had been
" notified of these defects, but nevertheless directed the
" engine to be kept in use, for (as one of them said)
" they were short of power, and had nothing to put in
" its place." So far this is the plaintiff's case, and is
" conclusive against the defendant unless answered, and
" what is its defence? Why, as I understand it, it is
" that the engine was furnished with cylinder cocks,
" that these cocks if opened would have allowed the
" steam to escape, thus preventing its accumulation in
" the cylinder, and its pressure upon the piston; that the
" engineer omitted to open the cocks, and was, therefore,
" guilty of negligence; that it was this negligence which
" caused injury, and so the defendant is exonerated?"
[How like the line of argument of the plaintiff in er-
ror !] Judge Danforth, continues " the defendant's con-
" tention comes to this: we concede that we failed in

" our duty, we did not supply a suitable machine, but " our servant, the engineer, could, notwithstanding, have " so managed that the defect should cause no harm. " If this doctrine is accepted it will loosen the rule of " responsibility which now bears none too closely upon " corporate conduct."

The analogy between this Cone case, and the one at bar, is complete. The testimony is conclusive, that this rope was in an unsafe and dangerous condition, chafed over a surface of from 5 to 6 feet, several yarns worn off, (fol. 73) chafed, fagged, worn, and the strands separated and all fagged out, (fols. 47, 49, 62, 63, 70, 78, 79, 86, 101, 102, 109, 141.) The testimony of the witnesses for the defendant below, shows that it was unsafe to use a spliced rope for that fall, (fols. 115, 96, 97, 102, 125, 129.) The testimony of Philip W. Lowe, an expert, called by the plaintiff in error (fol. 113,) shows that splicing don't improve a rope, and that it is unsafe to use a spliced rope which has to pass through sheaves or blocks, (fol. 115) for the manifest reason that the friction will wear down and chafe the spliced part and cause chafing, untwisting and drawing of the splice, (fol. 128.) This fall passed through 3 blocks (fols. 96, 97). But the counsel say, if O'Brien had only watched to see that the turns did not come out, or if they did, to put them in again, the accident would have been avoided. The answer to this is, that if the master supplied a deplorably unsafe rope, or allowed it to become in an unsafe condition, put a splice in it when it had to pass through blocks, he is not relieved from liability to an injured servant, because another servant did not use extraordinary care to prevent an accident,

which he saw was inevitable from the condition of the rope, and of which he gave notice to his superior, whose duty it was to replace the rope with a new or safer one. (fol. 146.)

Christopher Gerraghty.

We have in the original brief of appellee at pages 19 & 20 anticipated most of the arguments of plaintiff in error in reference to Christopher Gerraghty, and it is only necessary here to answer some of those arguments not referred to there or elsewhere in our briefs.

A.

It is unnecessary to deny that "the operation of the "fall, and the exercise of care and caution in that oper- "ation were not masters duties," (brief of plaintiff in error page 22)

If this accident had happened in consequence of the negligent operation of the machinery there might possibly be room for the argument that Gerraghty even though a foreman would still be a fellow-servant in performing the work of an operative. But there is no evidence in this case that the fall was improperly or negligently operated, nor that the rope was allowed to strike or scrape against the combings or other parts of the ship or scow, nor that it was in consequence of any negligent operation or use of the fall that the turns untwisted and the splice drew, nor that the turns came out by reason of the motion of the drum or the revolving of the articles hoisted, nor that an unusual strain had been put upon it. There was no trouble in the operation. *The*

trouble was that the rope was not in a safe condition to be operated.

B.

The contention of counsel for plaintiff in error is that although Gerraghty had full charge at the time, the watching of the rope to see that the turns did not come out or if they did to put them in was his duty only as an operative, and they say at page 36 of their brief, as an illustration:

" Assume an engine when starting to be in a suitable " condition, and during the journey the steam pressure " is allowed to exceed the limit, or the water in the " boiler is allowed to get too low, in either of which " conditions there is danger of explosion. Does the " law, which imposes upon the master the duty of main- " taining an engine in a suitable condition, require that " the master should stand by and see that the engine " does not get into this dangerous condition ?"

The answer to this is that *the engine itself would not be in a dangerous condition. The danger would not be in the engine as a structure,* but in the unusual and extraordinary pressure. The illustration assumes that the engine was in a suitable condition for the purposes for which it was supplied, and the danger of explosion would not arise in consequence of any defect, but because of the carelessness of the engineer or fireman in allowing the steam pressure to excede the limit or the water in the boiler to get too low. The danger therefore would not be of an explosion in the careful use of the engine, Hence, the illustration is not applicable

to the case at bar for the reason that "*it is a usual in-*
"*cident* in the operation of a single fall such as this
"was, that it will untwist." See brief of plaintiff in error, page 25, sub-division (4) where it is contended *that the coming out of the turns is an incident in the* CAREFUL USE *of the fall.*

But suppose the railroad company furnished an engine with a wheel, which was in the habit of getting off its axle. Before starting the train, the wheel was put in. After a while, true to its habit, the wheel rolled off. The attention of the conductor was called to it, and he put the wheel on again, and said to the engineer, "Now, you watch that wheel, and if it comes
"off again, stop the train and put it on." The wheel comes off, the train is thrown from the track, and a brakeman, ignorant of the wheel, is injured. Would not that brakeman have a cause of action against the company?

C.

The quotations from the charge on page 32 of brief of plaintiff in error, were not excepted to by counsel on the trial, and were merely statements of the substance of the argument of counsel for plaintiff below, in the view of the case there referred to. The judge, in his charge, made a similar summary of the argument of defendant below, (see charge fol. 194) on the same branch of the case. Throughout in his charge, he had, in separate

paragraphs, stated the law and the facts, emphasizing the distinction between the two, which is strictly in accordance with the rules of this court. (See original brief of Appellee, page 29 and cases there cited.)

Respectfully submitted,

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